LAW AND CONTEMPORARY PROBLEMS

ADMINISTRATIVE REGULATION

(TABLE OF CONTENTS ON INSIDE COVER)

SCHOOL OF LAW • DUKE UNIVERSITY
VOL. XXVI SPRING, 1961 No. 2

LAW AND CONTEMPORARY PROBLEMS

A QUARTERLY PUBLISHED BY THE DUKE UNIVERSITY SCHOOL OF LAW
DURHAM, NORTH CAROLINA

VOLUME 26 SPRING, 1961 NUMBER 2

CONTENTS

ADMINISTRATIVE REGULATION

PUBLISHED QUARTERLY
WINTER, SPRING, SUMMER, AUTUMN
Subscriptions: U. S. & Possessions $7.50; Foreign $8.00. Single copies $2.50
(A supply of copies of all issues is provided to fill orders for single numbers)
For information about microfilm (copies are now available in this form) write: University Microfilms, 313 N. First St., Ann Arbor, Mich.

Address all communications to LAW AND CONTEMPORARY PROBLEMS
DUKE STATION, DURHAM, NORTH CAROLINA

Entered as second-class matter December 10, 1946, at the post office, Durham, North Carolina, under the Act of March 3, 1879

LAW AND CONTEMPORARY PROBLEMS

VOLUME 26 SPRING, 1961 NUMBER 2

FOREWORD

The recent history of the administrative process has been a seemingly endless succession of crises, and the immediate future appears to promise no conclusive relief. Although this prospect may be somewhat distressing at first blush, it appears to be a normal function of a regulatory system that seeks continually to balance changing needs and resolve competing interests. Nevertheless, it is no mean tribute to the essential validity and vitality of the administrative process that it has managed to survive the trying ordeals to which it has periodically been subjected.

In the 1930's, a full-scale frontal assault was launched against the administrative process by those who opposed governmental regulation of economic and social endeavor in any form whatever. Rallying under banners bearing such legal-sounding legends as "due process" and "separation of powers," these critics seemed intent on emasculating or even destroying it. That they failed was owing not to any lack of vigor with which they pursued these ends, but rather to the almost universal recognition that the administrative process afforded the sole feasible means by which government could cope with the ever more complicated and voluminous problems that it was being called upon to solve.

The next attack on the administrative process was based on narrower procedural grounds. Critics, largely lawyers, assailed it as being deficient, both in conception and in actual operation, in its provision of safeguards against unfairness. Again, however, what might have been a crippling blow was successfully parried on the judicial, executive, and legislative levels, more or less effectively, by distinctive responses appropriate to each of the branches of government.

Today, the administrative process once more is undergoing a strenuous siege of examination and evaluation—this time, in terms of the extent to which is has, in practice, realized the hopeful expectations of its early champions. This latter-day criticism has covered a broad spectrum of charges—inefficiency, undue delay and expense, prejudgment of controversies, absence of clear rules, *ex parte* influences, capture by regulated industries, lack of expertise, excessive power of staffs, inadequate personnel, corruption, and lack of coordination—and these by no means exhaust the list. Suggested remedies have been similarly varied and wide-ranging, and the

eventual response that issues will profoundly affect the future efficacy of the administrative process.

It is against this background that the contributors to this symposium have cast their submissions, analyzing the suggested shortcomings of the administrative process and their proposed cures. No pretense at final solutions is offered, since the dynamic nature of any viable regulatory scheme requires almost infinite flexibility, a capacity for continuous policy adaptation and institutional change. It is hoped, however, that the thorough ventilation of underlying basic issues effected by this symposium will facilitate the rigorous analysis that a sound approach to this crucial subject demands.

* * * * *

On a more personal note, the Editor here records his imminent retirement, after two years as Associate Editor and six years as Editor-in-Chief. He wishes to express his deep appreciation for the support and assistance that he has received from his editorial associates and advisers and from the many others, both within and without the Duke University community, who have given so generously of their time and wisdom. A special debt of gratitude is due to both Mrs. Mary Louise Lewis and Mrs. Margrid Perry, to whose tireless and anonymous efforts much of whatever distinction this publication has attained is attributable. Finally, the Editor wishes to thank his readers for their faithful and continuing interest over the years.

MELVIN G. SHIMM.

THE REGULATORY PROCESS

MARK S. MASSEL*

We need to take a fresh look at the regulatory process. In recent years, we have been offered many criticisms of the administrative agencies, some suggested changes, and a few defenses. However, much of the discussion is so repetitive that it seems like an exercise in pouring old beer into new steins—producing a stale, flat potion. In the main, these deliberations do not encourage affirmative analysis of the more pressing problems of government regulation. Nor do they offer a firm basis for imaginative inquiry into the substance of public policy, rather than the form.

The discussions have reflected a familiar preoccupation with limited procedural technicalities, rather than an active interest in the practical problems of administrative regulation and its results. Semantic tags have been employed widely, if not wisely. The dichotomy of "rule-making" and "adjudication" has been employed to describe the total regulatory process. Meanwhile, the important processes of policy formulation, negotiation, and administration have been overlooked. Attention has been riveted on the independent commissions. Accordingly, the equally important regulatory functions of the executive departments have escaped notice.

In the almost ritualistic procession of critical moves and defensive countermoves, consideration has been confined largely to peripheral issues of procedure and organization. Substantial policy issues have been swept under the rug. The objectives of the regulations, together with their achievements, or failures, have been virtually disregarded in the search for changes in administrative form.

Most importantly, government regulation has been treated as an insulated, technical activity of government. Much of the discussion has been founded on the implication—stronger because unstated—that regulation is a legal function that can be protected from the contamination of other government activities. This academic assumption has been so imbedded that most of the debating gambits have overlooked three significant features of the regulatory process: first, it is inherently a political activity that is a substantial element in modern economies; second, the regulatory functions are too intertwined with a host of other government activities to be set as a class apart; and third, while procedural problems are important, they are subsidiary to the objectives and accomplishments of the regulatory functions.

Adequate consideration of the policy issues that are inherent in the regulatory process will depend upon a continuing awareness of our traditional anxiety about

* B.S. 1930, M.A. 1933, J.D. 1933, New York University. Member of the New York and Illinois bars. Member of Senior Staff, The Brookings Institution, Washington, D.C. Author, BUSINESS RESERVES FOR POST-WAR SURVIVAL (1943). Contributor to professional periodicals.

The interpretations and conclusions in this paper are those of the writer and do not necessarily reflect the views of the other members of the Brookings staff or of the administrative officers of the Institution.

government regulation, an anxiety that stems from our inability to make clear-cut decisions about what functions we want government to undertake. Our ultimate public policy goals are an interesting compound of social, economic, political, and international aims. Many of these aims conflict with each other. At least, they give such an appearance. For social and political reasons, we want many independent private enterprises because we believe that they will insure the effective working of the democratic process and equality of opportunity; at the same time, we look to large corporate aggregations to satisfy certain economic and military objectives. Many look to government for the solutions to broad economic and social problems; but others are restive about government interference. We want to assure everyone of his day in court; yet, we are unhappy with the lengthy administrative hearings that this objective entails.

Unfortunately, these ambivalent feelings about regulation have produced an analytical quirk. We habitually compare the actual results of one alternative with the theoretical workings of another. For example, when we discuss the regulatory process, we tend to compare its present operations with the theoretical advantages of competition. Conversely, when we consider competition, we are apt to contrast the current conditions of the market place with the theoretical perfection of regulalation.

This quirk extends into our considerations of the regulatory processes. Critics who emphasize the commissions' failure to formulate policy frequently paint an idealized picture of congressional capacity to make sharp policy decisions. Others compare Congress' hesitation to set down understandable rules with an optimistic portrayal of effective political leadership in the executive branch.

The dynamic pressures affecting our national life require a basic reorientation in our approaches to the regulatory process. We can no longer meet the requirements of current policy problems with technical changes in procedure. These issues require substantial attention to questions of substance. They call for broad-gauge consideration of the regulatory process in the context of the full range of government activities, rather than the narrow field of legal procedures.

To this end, this paper briefly reviews the criticisms of the agencies. It then sketches in an analysis of the assumptions that underlie this criticism. Finally, it suggests some impressions of what types of analyses are needed for evaluation of the regulatory process—evaluation that is an essential ingredient of improvement.

I

CRITICISMS AND PROPOSALS

The current century has produced a proliferation of governmental regulatory activities. Each development has quickly produced successive waves of critiques, defenses, and suggested improvements. While there has been a stimulating variety in the expository details, the underlying patterns of criticism and cure have remained

unchanged. For example, proposals for the abolition of the administrative agencies appear at irregular intervals; some made about twenty-five years ago were repeated recently. Complaints about the inefficiency and ineffectiveness of the commissions made by Henderson in 1924[1] have their counterparts in more recent reports by American Bar Association committees,[2] Hoover Commission Task Forces,[3] and such writers as Hector[4] and Landis.[5]

The criticisms and suggestions need no elaboration here. A quick review of their major elements should suffice for our present purposes.

Criticism has taken several tacks covering a wide range: inefficiency; undue delay and expense in regulatory procedures; prejudgments of controversies; lack of rules; enunciated rules are too detailed, too complex, and too tight; too many *ex parte* influences; too much contact with the regulated industry; too little understanding of the problems of the industry; too much power in the hands of the staff; commissioners' failure to write their own opinions; inadequate personnel on commissions and their staffs; corruption; "sandbagging" of companies and private citizens; and lack of coordination.

Similarly, suggested cures have a familiar ring: set up administrative courts; assign legislative functions to the Congress, adjudication to the courts, and administrative work to the executive branch; reshape the agencies in the image of the courts; extend terms of commissioners to ten years; require that commissioners write their own opinions; prohibit or regulate *ex parte* communications; establish policy leadership through a presidential overseer; and improve personnel.

It is noteworthy that the major legislation that has been passed to effectuate a "cure" was concerned with procedural problems exclusively. The Administrative Procedure Act,[6] as its name implies, dealt with procedures for enunciating rules, instituting and processing cases, holding hearings, and issuing decisions. It set up barriers between prosecuting and judicial functions by blocking off communications within the agency. For example, the Federal Trade Commission, itself, may not consult its own staff of economists or accountants when it reviews the decision of a hearing examiner. This rule emerges because the Commission's economists are employed in divisions that are called upon to aid the counsel supporting the complaint.

[1] GERARD C. HENDERSON, THE FEDERAL TRADE COMMISSION (1924).

[2] ABA Special Comm. on Legal Services and Procedure, *Report*, 81 A.B.A. REP. 491 (1956); ABA Special Comm. on Administrative Law, *Report*, 61 A.B.A. REP. 720 (1936).

[3] COMM'N ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, TASK FORCE REPORT ON LEGAL SERVICES AND PROCEDURE (1955), TASK FORCE REPORT ON REGULATORY COMMISSIONS (1949).

[4] Hector, *Problems of the CAB and the Independent Regulatory Commissions*, 69 YALE L.J. 931 (1960) [this report has been published as a committee print by the Senate Committee on Government Organization, 86th Cong., 2d Sess. (1960)], *The New Critique of the Regulatory Agency*, 12 AD. L. BULL. 12 (1959).

[5] Landis, *The Administrative Process: The Third Decade*, 47 A.B.A.J. 135 (1961); JAMES M. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT (1960) [this report has been published as a committee print by the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 86th Cong., 2d Sess. (1960)].

[6] 60 Stat. 237 (1946), 5 U.S.C. §§ 1001-11 (1958).

II

UNDERLYING ASSUMPTIONS

While much of the criticism is merited, there has been no systematic evaluation of either the critiques or the suggested cures. Each attack is based on assumptions about the nature of the regulatory process, its operative characteristics, and its goals. Yet, there is a virtual dearth of analysis regarding these assumptions as well as the criteria that are employed in the offensive and defensive countermoves.

In order to attain a practicable program of improvement, we must define and analyze these assumptions. We must determine how well they fit the actual situation. We must check them for consistency. We must reconsider the premises on which they are founded, and determine whether their compass has been sufficiently broad or whether it has been so narrow that vital deficiencies in the regulatory process-in-being have been overlooked.

This section outlines the assumptions that appear to be implicit in the major criticisms. It indicates the confined outlook reflected in these assumptions. It suggests that the charges have been so concentrated on procedure and form that significant progress requires a reorientation in our analysis.

A. Efficiency

A principal target set up by the critics has been the inefficiency of the administrative agencies. Proceedings take too long to complete. There are irksome delays before any decisions are made. The procedures are too cumbersome and too expensive both for the government and for the parties who are involved. The backlogs of cases are too large and are growing.

While this criticism may well be merited, it has not been founded on sufficient analysis to suggest what has caused the condition, exactly how serious it is, or what influence it has on the effects of the regulations. Available statistics indicate that a problem exists. Backlogs have increased, and the time it takes to process many types of cases has been lengthened. However, we have no practical gauges for determining what is a reasonable time, nor have we evaluated what features of the process would be lost if proceedings were accelerated. Further, we have not checked the possibility that acceleration of some procedures might not be in the public interest.

Available statistics about backlogs and lengths of proceedings lie in the shallow grave of averages. The data treat all proceedings as if each had equal importance. No allowances are made for the differences in the complexity of proceedings, the novelty of issues presented, or the practical significance of timing for various types of procedures. Obviously, each agency has to contend with a wide range of complexity in its work. Some proceedings require more extended proofs and more detailed considerations than others. Dealing with the misrepresentation of the quality of fur coats is not as intricate as prosecuting a sophisticated price-fixing plan that must be established through circumstantial evidence. Nor does it warrant the same priority on the docket.

The issues of efficiency are tied up with procedural requisites. A requirement that everyone who is remotely interested in a case must have his "day in court" will inevitably extend proceedings. The provisions of the Administrative Procedure Act, combined with the agencies' defensive posture against further attack, seem to have pushed them into an unfortunate position. In response to this criticism, hearing examiners and commissioners are willing to turn over every stone that might bear on the issues of the case. Further, they are prone to allow a defense counsel wide leeway in playing a delaying action whenever it suits his purpose.

The piling up of backlogs has been discussed widely. However, neither the agencies, the Congress, nor the critics have attempted to set up guides for gauging the time taken for various types of procedure. Nor has any effort gone into developing bench marks to measure the substantive importance of a proceeding and to give it a position in some order of priorities. As a result, each proceeding seems to warrant the same painstaking attention as every other. Unimportant questions are taken up as readily as issues of consequence. Misrepresentations regarding a cure for baldness are treated as seriously as a corporate merger that may have a profound influence on competition in an important market.

Because of the absence of yardsticks, agencies may take on too many cases and may devote too much time to the insubstantial ones. Similarly, commissions may entertain appeals on insignificant issues.

On the other hand, it is possible that delays and backlogs can reflect budgetary deficiencies rather than weak administration. The absence of criteria for analyzing budgetary needs seems to require profound attention. Professor Parkinson has given us not only a law, but a theology as well. However, there do seem to be occasions when objective analysis might indicate the need for additional staff to handle greater work loads. On such occasions, Parkinsonian theology seems to be less than enough.

The emphasis on efficiency illustrates again the shortcomings of a preoccupation with procedure. We are all against inefficiency as a form of sin. However, a blind pursuit of proficiency may produce better ways to do the wrong thing. An extreme illustration of the need for relating the substance of policy to the search for efficiency may be found in rate-making. It is conceivable, possibly probable, that a speed-up in rate-making would harm the public interest.

Verbiage of the regulatory theories aside, the current rules for setting utility rates boil down to the limitation of profits. By and large, costs are accepted and the agencies' supervisory functions are limited to considering the reasonableness of the profit component in the rates that are charged. Unfortunately, the established patterns of regulation offer few incentives for reducing costs.

Now, if rate procedures were accelerated so that rate increases were granted in, say, two weeks, the utility would lose all incentive to control costs—unless rates were pushed to such heights that they reduced volume substantially, an unusual situation. However, since the company knows that a rate proceeding will take several years, it feels a pressure to keep its cost in hand. It must make some effort to maintain

efficiency and to watch both wage rates and the prices it pays for supplies and equipment.

Similarly, a speedy procedure would probably eliminate company incentives to reduce costs. If any cost reduction were followed immediately by a drop in rates, the utility would have no stimulus to push for cost savings. Hence, it would appear to be in the public interest to continue the present procedural "inefficiency" until affirmative policies can be developed to provide substantial spurs to operating industrial efficiency.

In general, these drives for proficient procedures seem to disregard several crucial points: substantive policy issues, budgetary needs, and the influence of procedural requirements. However, the need for efficiency cannot be disregarded. The important issue is: Will we improve the regulatory process with dismally familiar slogans, or will we push for empirical analysis to determine causes, to construct bases for improvement, and to strike a reasonable balance among the factors that affect efficiency—in both the agencies and industry?

B. The Legal Dichotomy

Some of our preoccupation with agency procedures seems to stem from a proverbial dichotomy that unduly narrows the concept of the regulatory process. Many of the critics and defenders—possibly the majority—read the regulatory process as composed of two sharply differentiated elements: rule-making and adjudication. Hence, many evaluations of the process are based exclusively on the effectiveness of these two functions. Other germane activities of regulatory agencies are screened out, and a conceptual framework emerges that is far too narrow.

Conceptually, this dichotomy fits into a legalistic pattern of analysis. Rule-making is clearly a legislative function, while adjudication is a judicial one. The appeal of this framework is its close relationship with the basic construct of the tripartite system of government: legislative, executive, and judicial.

By way of contrast, these distinctions have not acquired prominence in countries that employ a parliamentary system. In those countries, the action of a regulatory agency is subjected to review in a parliamentary discussion in which the pertinent minister participates. The courts are concerned only with the question of whether the agency exceeded its authority. Nevertheless, in those other countries—in England, for example—there seems to be no disregard of the rights of the individual or of fair play.

While the general conception of the two functions seems to implement our checks-and-balance theory of our governmental structure, the distinctions between the functions have not been clear. For example, a decision to add a third carrier to the air route between Chicago and Cleveland has been tagged as "rule-making," while the choice of the company that will serve as the additional carrier has been described as "adjudication." Needless to say, the classification has supported the argument that the two decisions should be independent. Indeed, the application of some sug-

gested cures would place the two activities in separate agencies. However, no logical principle has been suggested to support this definition. Further, it seems highly unlikely that a regulatory agency would decide to add a third carrier unless it has some assurance that an adequate airline can be induced to serve the route, or unless the agency has the power to order a company to undertake the service—an authority that the Civil Aeronautics Board does not possess. Hence, this distinction seems neither clear nor useful.

The use of the classification of rule-making and adjudication underlies much of the criticism of the regulatory process. This preoccupation has blocked objective examination of many regulatory activities. On the whole, those processes that do not fit the classification have been ignored.

The rule-and-adjudication categories overlook a great bulk of regulatory activities. Many, if not most, agencies must exercise their functions mainly through negotiation and administrative decisions. Those that are charged with promoting and expanding the industries that they regulate must consider possible industry reactions even when they make decisions that have judicial overtones.

There are reasonably persuasive indications that the work of many agencies would bog down if informal negotiations were discontinued. Further, a requirement that all actions must fit into the groove of rigid, formal procedures would cause unnecessary harm to many individuals and companies. If the Federal Trade Commission were compelled to discontinue its stipulation and consent order procedures, it would have to forego a major part of its activity. At the same time, the publicity and expense connected with its formal proceedings would hurt many companies that had innocently slipped into technical violations that have no substantial competitive consequences.

The bulk of the enforcement of the Food, Drug, and Cosmetic Act[7] appears to rest on negotiation. Experts representing the agency and the companies can settle most problems through sensible discussions on a technical level, without the trappings of those procedural requirements that surround a formal hearing.

Public utility commissions must employ informal negotiation and administrative decisions. Otherwise, every service complaint would have to be ground through the procedural machine. Otherwise, every variation in rates and every differential or special charge would call for a full-dress rate proceeding.

The promotional functions of the agencies require negotiation. A decision to add another route may emerge from an airline's discovery that such a route would fit into its schedule so well that improved service could be added at low cost. The strict rule-and-adjudication tandem would make it awkward for a commission to entertain such a suggestion, much less act on it.

Again, promotional functions must bring a realistic note into some of the agencies' quasi-judicial proceedings. If an applicant for a certificate of necessity obtained a ruling that limited its capital-return too drastically, it would not construct the facility.

[7] 52 Stat. 1040 (1938), 21 U.S.C. § 301 (1958).

Hence, such a ruling would affect the growth of the industry. In such a proceeding, the agency cannot confine its consideration to the task of formulating an insulated judicial decision about the claims of two adversaries before it. The decision has such a direct link with future development that the agency must consider what rate will stimulate the investment without upsetting a general rate structure. It must, in effect, judge whether the protesting utility is bluffing when it says that a low return will foreclose investment funds, or whether the claim is genuine.

Because the dichotomy fails to encompass all the functions of the regulatory process, it provides an awkward setting for the consideration of policy formulation. It allows no distinction between policy formulation and policy enunciation. At the same time, it overlooks the roles of the major participants in policy formulation: Congress does more than pass laws; the President's role is not confined to issuing formal orders; department heads and the commissions may formulate policy through rules or case by case; agency staffs play a major role in uncovering policy problems, gathering information, applying the general policy decisions, and calling attention to policy deficiencies that show up in applications; the regulated industry participates in policy formulation through its pressures for changes in policy and through the information and arguments that it presents to the Congress, the agency, and the courts in individual cases; and much of the policy development depends upon judicial interpretations.

Policy formulation is a never-ending process. It calls for feedbacks of ideas and information coming from the administration of existing policies. New problems arise that cannot be foreseen when rules are developed. As conditions change, they may require changes in policy.

Above all, policy-making is and must be a political process. Policies that are more than ministerial cannot always be set by the experts of the regulatory agency. The learned disciplines have not achieved the capacity to guarantee consideration of all the factors in an industrial situation. Therefore, the positions taken by the industry and others help to spot the forces that may have been overlooked in the analysis. Further, such outside advice provides valuable clues regarding the practicability of a proposed policy. Else, a theoretically-perfect policy may be broken on the back of the political resistance in the industry, in the Congress, or in the executive agencies.

Many policies must be forged in the case-by-case mill. Neither existing knowledge nor research can provide substantial bases for all rules. Many policies must be developed gradually, moving from problem to problem and observing the effects of prior decisions. Without this process, some rules may be meaningless or so rigid that they defeat some of their own purposes.

There is an important distinction between policy development and policy enunciation. Some assume that regulation always requires clear-cut statements of policy. Therefore, if no rule is announced, they believe that the regulatory processes are injured. However, these assumptions have been neither tested nor established.

At times, the need for flexibility may be greater than the requirements of public knowledge. Indeed, a premature public statement may prevent an agency from developing a sensible course.

As a matter of fact, the drive for issuing rules covering all phases overlooks many aspects of deliberate national policy. For example, our antitrust laws are premised on case-by-case development. No provision is made for rule-making. The Federal Trade Commission has, on occasion, suggested guides for its staff and industry. However, it has consistently maintained that its antitrust guides are merely suggestions and not formal rules.

The criticisms of policy-making seem to be founded on the assumption that the agencies refuse to issue rules because of timidity, inability, and ineffectiveness. There seems to be no room allowed for the possibility that there exist reasonable grounds for the agency practice or institutional pressures against such a practice.

Yet, since resistance to enunciating policy is found at every level, reasons for it are probably more complex than mere administrative weakness. We have not investigated or evaluated the many factors behind the hesitation: the desire or need to maintain flexibility; agencies' fear of congressional attack on enunciated rules; the uncertainty of a generalization for lack of knowledge and analysis; the inability to generalize; and the lack of pressure for a commitment.

As a matter of fact, frequently the reluctance to spell out policy stems from the Congress. Often, Congress avoids policy problems by passing vague statutes. Such a practice may be followed, on occasion, in order to permit the regulatory agency and the courts to implement the general provisions. However, it may also be employed in order to avoid tough political decisions, "passing the buck" to the agency.

C. Policies and Prejudgments

Several of the criticisms are difficult to reconcile. On the one hand, it is alleged that the agencies do not promulgate enough rules. On the other hand, agencies are criticized for prejudging many issues. Related to these issues is an interesting dilemma: Should agency heads maintain close contact with regulated industries in order to develop familiarity with their operations, or should they keep the industries at judicial arm's length?

Policy-making is a form of prejudgment. The enunciation of a rule determines pertinent conclusions in future cases. Else, there would be no point in issuing a regulation. Therefore, the broad, general criticisms of these two factors are difficult to reconcile.

A more closely pointed analysis might indicate areas in which the two lines of criticism may be reconciled. If it could be shown that an individual case is prejudged in the absence of a policy or that the prejudgment related to an application of policy, an agency might exercise policy-making functions and inconsistent prejudgment at the same time.

However, the broadside criticisms are difficult to evaluate. If we want clearer policy guides, we must be reconciled to substantial prejudgment.

The problem of agency-industry contacts presents a difficult dilemma. If all agency functions could be sharply delineated into rule-making and adjudication, it would be possible to hang a set of principles governing industry relationships on those two pegs. *Ex parte* discussions would be proper during a rule-making process and improper in connection with adjudication. However, since the dichotomy does not fit the day-to-day operations of the agencies, it does not provide a satisfactory basis for constructing rules about industry relations.

If an agency exercised only one function at one time, a principle could be formulated: during the time that a judicial proceeding is in process, all *ex parte* discussions would be improper. However, some agencies rarely find a period when only one function is exercised. An agency may have under consideration at one time: a proposed policy; a field investigation of industry developments; a quasi-judicial proceeding that has no promotional consequences; and a proceeding that does have such consequences. To illustrate the differences between the last two types of proceedings: a decision about a rate base would affect the future development of the industry if it involved a proposed new pipeline; contrariwise, if the line had been constructed, then the rate decision would not influence its operation.

D. The Independent Commissions

The persisting drive to mold the independent commissions in the judicial image overlooks the historical reasons for their existence. At the same time, it provides another demonstration of the policy quirk—comparing the actual with the ideal. For, much of the criticism is based on a comparison of the commissions in operation with an idealized view of the Congress and the courts.

Curiously, public consideration of the regulatory process has tended to focus on the independent commissions and to slight the equally significant and more numerous regulatory functions of the executive departments. This preoccupation may be due to the rough historical coincidence of the inauguration of the commission form and of the development of scholarly interests in government regulation. Or, it may be due to the influence of the legal profession, which has exhibited the major interest in the field. The lawyers' admiration for the judicial process may have found a natural outlet in the commissions, which were vested with the coloration of "quasi-judicial."

The administrative agencies were set up precisely because it was recognized that the Congress and the courts could not cope with the regulatory problems. As our technological and industrial development became more complex, it became evident that Congress could not write the detailed policies needed for business regulation and that the courts could not apply them properly.

Congress could not devote sufficient attention to the complex problems of supervising industrial regulation or of guiding key industrial developments. It could not,

for example, undertake the supervisory encouragement of the important railroad industry. Nor could it refine policies through the case-by-case process.

The judicial procedure was not equipped for regulatory administration. Judges could not act until questions were brought to them. They had no mechanism for dealing with the problems of all of the members of an industry at one time, either through one proceeding or through an organized series of actions. They could not conduct independent investigations. They could not develop a specialized background. They lacked the capacity to handle the many involved types of regulatory situations that required flexible give-and-take negotiation, and they did not have adequate staff assistance for such activity.

Because of the need for developing and administering detailed policies, the executive departments were given various supervisory powers, subject to judicial review. However, when detailed regulation was considered for the railroads, Congress decided to set up an independent commission. The decision was made, in part, because many members of Congress feared to give additional powers to the Department of the Interior, which previously supervised the railroads. Since the Department was responsible to the President, who was a former railroad lawyer, they felt that it might be restrained from a wholehearted safeguard of the public interest.

After the establishment of the Interstate Commerce Commission in 1887,[8] the next important step in government regulation was the passage of the Sherman Act in 1890,[9] placing administration in the hands of the Department of Justice and the courts. However, by 1914, it was felt that the Sherman Act did not meet the needs. Both President Wilson and the Congress believed that an independent commission was needed to make up the deficiency. The Federal Trade Commission was organized to administer its own Act,[10] which contained a provision against unfair methods of competition. At the same time, it was set up to supplement the work of the courts in the administration of the Clayton Act,[11] which was passed in the same year in an effort to close some of the gaps that were found in the administration of the Sherman Act.

During the 1914 discussions, much was made of the need for an expert body. However, even at that time, reactions were ambivalent rather than consistent. For, having decided that more expertise was needed to effectuate the regulation, Congress confined the powers of the Federal Trade Commission to issuing orders to cease a specified practice. Meanwhile, the courts were left with broad discretion about the remedies that might be imposed for violations of the Sherman and the Clayton Acts. As a result, when the Commission finds that an industrial practice would tend to create a monopoly, it can only order the company to discontinue the

[8] 24 Stat. 383 (1887), 49 U.S.C. § 11 (1958).
[9] 26 Stat. 209 (1890), 15 U.S.C. § 1 (1958).
[10] 38 Stat. 717 (1914), 15 U.S.C. § 41 (1958).
[11] 38 Stat. 730 (1914), 15 U.S.C. § 12 (1958).

practice. On the other hand, a federal court can decide that the company should give up patent rights, or divide the enterprise into two or more parts.

Today, a number of other regulatory commissions are charged with several other forms of regulation—Federal Power Commission, Federal Communications Commission, Securities and Exchange Commission, Civil Aeronautics Board, Maritime Board, Federal Reserve Board, Tariff Commission, National Labor Relations Board, and Atomic Energy Commission.

E. Departmental Agencies

As the regulatory functions proliferated, many were assigned to government departments. Such departments as Health, Education, and Welfare, Agriculture, Interior, Commerce, Post Office, Treasury, Labor, and Justice administer substantial regulatory powers. They supervise many activities—for example, those touching on the use of public lands, the marketing of agricultural products and those of fisheries, minimum wages and hours, customs, immigration and related affairs, antitrust, literature, corporate securities, social security payments, alcoholic beverages, food, drugs, cosmetics, and hazardous substances.

Some of the most important regulatory functions of the executive departments rest on the authority to prosecute. The Antitrust Division of the Department of Justice was charged with the function of prosecuting antitrust violations in the courts. However, it has long engaged in regulation through the negotiation of consent decrees. Under the consent procedure, the Antitrust Division and the defendants conduct shirt-sleeve negotiations to work out a decree. The order is entered by the court with the same force as a decree written by a judge after litigation, except for its status in subsequent treble-damage actions. Between eighty-five and ninety per cent of the antitrust decrees of recent years have been negotiated in this manner. There are indications that the majority of these consent decrees are negotiated before any complaint is filed.

Hence, the Antitrust Division exercises the powers of a regulatory agency. In fact, its regulatory powers appear to be more significant than those of the Federal Trade Commission. The Antitrust Division's decrees can be more drastic than Commission orders. Further, the Antitrust Division's negotiations are conducted with greater leeway than those of the Commission. While approximately seventy per cent of the Commission's orders are negotiated, almost no orders are discussed until a public complaint has been filed. Therefore, the Commission's negotiations take place in the setting of the charges listed in a public record. In contrast, the Antitrust Division frequently formulates the complaint after it has negotiated the consent decree, a procedure that enables it to confine the public charges to the subject-matter of the decree.

Despite the many regulatory functions of the executive departments, criticisms of the regulatory process have been leveled almost exclusively at the independent commissions. The departments issue regulations, regulate entry into business, and adjust

controversies. Some of the functions of the departments are, as a practical matter, subject to no judicial review. Yet, the preoccupation with the independent commissions continues throughout all considerations of the regulatory process.

F. Malfeasance

Another type of criticism may be found in occasional attacks for specific malfeasance in office. On the whole, such charges have been related to issues of *ex parte* contacts with the regulated industry. Because of this connection, efforts to avoid questionable practices have been linked up with procedural safeguards and with improved selection of personnel.

In this approach, the strategic relationships between the substance of regulation and the ethical problems it generates have been largely overlooked. The influence of a regulatory pattern that exudes the aura of a give-away program may be so strong that procedural safeguards hardly meet the needs.

Television broadcasting provides an illustration of the need to consider problems of substance instead of confining attention to procedure. Recent hearings showed up questionable practices on the part of one member of the Federal Communications Commission in his consideration of a license for a new station. Criticism was directed to lack of ethical standards.

Unfortunately, the "affair" was used to spotlight questions of ethics, while the underlying condition that encouraged the criticized practice was ignored. There are reliable signs that the licensing system for television stations provides a natural breeding ground for responses to pressures based on friendship, political favors or contributions, and personal gain. Given the limited number of stations and the lack of rigorous standards for screening applicants, a number of equally qualified candidates are available for many franchises. Unless and until more definitive standards can be set, there is no clear public-interest basis for choosing among those who qualify. Against this background, there are estimates abroad that a television license in a town of moderate size can be worth between three and four million dollars.

In this situation, how can some form of corruption—intellectual or other—be avoided? Regulation and exhortation against *ex parte* influences may only encourage more subtle forms of pressure. Indeed, in such situations, the only way to force the regulators to follow their independent interpretation of the public interest may be to encourage enough pressures on all sides. Conceivably, a complex of pressures can serve to cancel each other. However, a procedural effort to eliminate all pressures may only put a premium on the more subtle types resting on personal and political friendship.

The affirmative criticism in such a situation might be more profitably directed to substance. Can more substantial public-interest standards be forged? Until significant progress can be had along these lines, it might be preferable to inaugurate a bidding system awarding the license to the qualified applicant who offers to pay

the highest annual fee. Such payments would not be difficult to justify, since the scarcity value of the license is based upon the use of the public domain.

G. Coordination

One of the most serious deficiencies in our considerations of the regulatory process is the preoccupation with those phases of government activity that bear a regulatory tag. We have given insufficient attention to the wide scope of nonregulatory functions that bear heavily on the regulatory burden and on its chances of meeting public policy objectives.

Some of these activities work at cross-purposes with the regulatory functions. Some support regulation. Many provide the basic setting for the regulation and have a more profound influence on industry structure and practice than the regulatory agency can ever achieve. At the same time, not all of the regulatory activities appear to mesh with each other.

Competitive policy is a case in point. While a great deal of regulatory activity is dedicated to the promotion of competition, many government functions are not. Protective tariffs and other regulations block out foreign competition. Government purchasing and research and development programs frequently encourage industrial concentration and partial monopoly. In fact, much of the newly developing technologies are government subsidized, and contractual arrangements may have a profound effect on future industry structure. Meanwhile, some of the regulatory agencies have used their authority to curtail competition by limiting entry into markets and by maintaining higher rates for service than would obtain under more competitive conditions.

The air transport industry illustrates the all pervasive influence of other government activities on the work of a regulatory agency. The Civil Aeronautics Board exercises a number of regulatory functions: safety, routes, service, corporate structure, financing, and rates. Other agencies make and have made direct promotional and development expenditures: many airports were built by the federal government as military installations or in an effort to promote civil aviation; the program has been continued through partial contributions to airport improvements and to road-approach programs; safety equipment is financed and operated by the Federal Aviation Agency; and subsidies have been paid to aid the development of the airline companies, although today they are confined to feeder and helicopter services. The government gives indirect aid: the development of military aircraft, which substantially reduces the cost of civilian counterparts; mail contracts; and federal tax exemptions for the bonds of municipalities, which finance and administer most airports. Many other federal functions affect the airline industry: international agreements regarding rates and routes; the coordination of military and civilian flights; supervision of other methods of transportation, which affects airline competition with those other forms—for example, a railroad can be permitted to discontinue passenger service to small communities because subsidies are paid to

feeder airlines that will serve those communities; and the relationship between the rates set for railroads, trucks, and bus lines, which affects the level of airline fares and the volume of traffic.

Given such a variety of functions, evaluation of the regulation of rates and routes should take the entire pattern into account. Indeed, such evaluation should encompass the lack of coordination. Determinations regarding routes and rates depend upon a host of other functions. Safety regulations may increase operating costs. International pressures and rivalry may force airlines into expensive jet operations and investments before they are necessary. On the other hand, airport and road subsidies, the development of military prototypes of civilian aircraft, and operating subsidies may reduce airline costs and serve to increase the volume of traffic. Further, other regulatory and nonregulatory activities bearing on competing services, as well as the complementary features of transportation and communication by road, railroad track, water, wire, and radio, have a substantial influence on airline traffic and costs. In this setting, the regulatory process is part of a complex of government-industry relations. In fact, the final rate-role of the Civil Aeronautics Board may serve mainly to control the profit component of price, while other government activities control the cost component, which is clearly the more important.

III

THE NEEDS FOR EVALUATION

As stated above, we require a fresh look at the regulatory process. The established confines of evaluation set such narrow limits for the public consideration of the problem that many of the most important public policy issues are slighted. Affirmative progress will require developing a broader orientation and avoiding a preoccupation with procedural problems.

Positive progress requires a recognition of the political nature of the regulatory process. For if regulatory problems are treated exclusively as technical questions, we will probably continue to confine our efforts to procedural issues.

In this examination, we must consider the relative advantages of the independent commission and the executive department. Such inquiry may indicate that one form is superior to the other for certain purposes. At the same time, it should provide clues to the most fruitful way to employ each form.

Finally, for basic evaluation we must develop criteria for policy evaluation and methods of policy review. Else, we shall continue to avoid the more important and more difficult problems and cater to our preoccupation with the peripheral issues of procedure.

A. Nature of the Regulatory Process

While the regulatory process finds expression in legal procedures, it must be recognized as a political function and not an exercise in technical jurisprudence.

As a governmental activity, regulation has a political orientation in its inception. Both policy formulation and execution are dependent on political outlooks and pressures.

Many critics, as well as supporters, either seem to ignore or want to avoid the political nature of the process. Independent agencies were frequently promoted by reform movements in order to avoid the pressure of politics and to base regulation on the nonpolitical analysis of the expert. However, Congress had to set the policy framework and will continue to do so, while the President can exercise varying degrees of leadership. Similarly, the regulated interests strive to influence the agencies in order to maximize their private goals. Hence, while the members of a commission are expected to maintain the cool aloofness of a judge, they are also required to maintain contact with the economic developments and to cope with political problems.

Part of the difficulty is probably semantic. "Political" is a term that covers a wide variety of concepts from the *quid pro quo* of activity in dishonest wards to the broad concept of the "body politic."

Somewhere between these extremes, there is an interpretation of "political" that reflects the workings of government organization, that encompasses the operations of political parties but that is not confined to them, and that recognizes the limitations of "independence" and the forces of pluralism in our society. Such a concept recognizes: that commissions are not completely independent agents free of political pressures and controls; that congressional committees are influenced by public opinion, the force of the press, and attitudes of other members of Congress; and that congressmen are influenced by popular opinion, their prospects for re-election, and the strength of partisan forces. The President, in turn, must consider popular attitudes, congressional pressures, party problems, and, in many instances, international factors.

In this context, the regulatory process is necessarily more political than the judicial. Moreover, even the judicial function, which is somewhat insulated from the political, is not entirely free. While judicial tenure is not political, the selection of judges is. What is more significant is that the selection of cases to prosecute and the legal theories underlying enforcement are in the hands of the regulatory agencies. No judge can affirmatively decide that a problem should be brought before him. The judicial process assigns him a passive role. Ultimately, he is bound by the evidence and arguments presented to him. He is not expected to take affirmative action either to investigate the evidence or to forge legal analysis that is unrelated to the arguments that have been presented to him. His work is strongly influenced by the activities of the regulatory agencies, which must participate actively in the broad process of government.

While regulation must accommodate and utilize the analysis of the technician, it cannot rest exclusively on technical expertise. In the development of policy, the expert is needed to suggest alternatives, to analyze them, and to predict their conse-

quences. However, the policy-maker must take account of the practicability and acceptability of the alternatives. The technician is required also in the administration of policy. Yet, the selection of cases, decisions about what problems to give priority, and final administrative conclusions require political as well as technical judgment.

As we have seen, the host of government activities that impinge on the regulatory fields are so important that they cannot be disregarded in any realistic evaluation or administration of regulatory policies. This feature is especially significant because it demonstrates the essential shortcoming of the exclusive legal-judicial interpretations of the regulatory functions.

For all of these reasons, the regulatory process is and must be political. Efforts to avoid or to ignore this condition have produced insubstantial results. These efforts have led us to accept *a priori* analysis because of the legal liking for the employment of precedent and principle. As a result, we have tended to formulate principles for judgment too quickly. We have generalized on the basis of slight evidence. Above all, we have clearly held back the empirical analysis that is so badly needed.

B. Nature of Independence

Because of the efforts to regard the regulatory process as a technical function, the nature of the independent commission has been assumed to be clear without further consideration. We have not compared the relative strengths and weaknesses of such commissions with those of the single-headed agencies that may carry on similar functions. More seriously, after clothing the commissions in judicial robes that may not fit, we have criticized the wearers for not bearing the garments properly, instead of considering whether the robes fit the needs.

Many of the basic concepts of the commissions need clarification. Merely calling them the fourth branch of government offers no road to understanding. The single-head departments also combine legislative, judicial, and executive functions.

The conceptual nature of commission independence has not been defined. The commissions are not responsible to the President. Yet, he appoints all commissioners with the advice and consent of the Senate, and he designates the chairman of each, except for the Interstate Commerce Commission. His power to remove a commissioner is sharply limited. On the other hand, budget requests of the commissions go through his Bureau of the Budget, as do legislative recommendations, with one exception.

Commissions have carried a second tag, "arms of the Congress," which may provide a better clue to their position in the federal framework. There is room for believing that the major reason for the independence of the commissions is the rivalry between the Congress and the executive branch. Congress regards the independent commissions as its own agencies, independent of the President, following the tradition of the Interstate Commerce Commission. However, the general pat-

tern is so unclear that the designation has led some to believe that the commissions are and should be independent of everyone.

The confusion has been compounded by the status and functions of the hearing examiners employed by the commissions. In order to promote a judicial aura around the regulatory procedures, a number of efforts have been made to give the hearing examiners a high degree of independence. However, the basic status of the examiners has neither been analyzed nor been settled. Are they autonomous judges who act in their own independent capacities? Are they arms of the commissions, empowered to hold hearings in the agency's name and to report back their findings and to suggest decisions? Some of the efforts to change regulatory procedure seem to be directed to constituting the hearing examiners as district judges and the commissions as appellate courts. However, this direction has not been founded on a broad consideration of the functions of either the examiners or the commissions. Nor has it been based on an analysis of where the commissions fit in the general framework of government.

We need to develop an analytical structure for the relationship between the independent commissions and the executive departments. The relative strengths and weaknesses of the two need investigation to promote a clearer understanding of their functions.

The independent commission might have greater capacity for more independent judicial action and for closer relations with the Congress. Because of staggered terms and bipartisan composition, the commission might be able to maintain more stable policies in the face of changes in the administration.

On the other hand, the single-headed agency can enjoy a more affirmative direction. It can be coordinated more readily with the administrative policies that affect the pertinent industries through the many public activities that do not fit the legal definition of regulation. Its policies and activities can be coordinated with other regulatory functions more effectively.

Peculiarly, the single-headed agencies seem to have less congressional difficulty than the commissions. We clearly need empirical analysis to check this general impression and to discover the reasons for the condition.

Another difference between the two types lies in the method of treating charges of corruption, inefficiency, or poor judgment. When charges were made against a Secretary of the Air Force, President Eisenhower had no difficulty in replacing him. After the change, criticisms of the Air Force disappeared and the new Secretary carried on without unusual difficulty. In contrast, recent attacks on the Federal Communications Commission have been much harder to meet. Although one member of the Commission was dropped, the congressional criticism has continued. The development of a satisfactory situation is difficult. It would be impractical and unfair to replace all of the members of the Commission, or to set up a new body in the same way that the old Federal Radio Commission was treated. How-

ever, the steady stream of criticism can have such a demoralizing influence on both the Commission and its staff that positive action for improvement is impeded.

Currently we are employing both forms for similar activities without even attempting to analyze which is better suited for what task. In one field, antitrust, we have overlapping functions assigned to a commission and a department. As demonstrated in the discussion of the consent procedures, the Justice Department seems to exercise more discretionary power than the Federal Trade Commission. Yet, all efforts at procedural safeguards are directed to the Commission and not to the Department. Further, when the Department executes its functions through the courts, the procedural requirements, the substantive elements in some violations, and the nature of the remedies differ from those of the Commission.

An analytical re-examination should encompass both types of agencies. We must consider the regulatory process as a whole. Unless we can avoid the conventional preoccupation with the agency form, we will continue to impose restraints on our progress toward practical improvements in our regulatory functions.

C. Criteria for Evaluation

An outstanding feature in the consideration of the regulatory process is the need for developing criteria for judgment. Most discussions rest on many yardsticks that are assumed but that are not enunciated or analyzed. On what basis should we evaluate the work of the agencies; how do we gauge their effectiveness; what yardsticks can be established to judge the length of time an administrative proceeding should take; what are the relative balances between assuring defendants and respondents that they will have their "day in court," and making sure that the proceedings are handled with expedition? Should we concentrate on procedure or give equal attention to effect? How should we evaluate policy?

By and large, evaluations concentrate on procedure. Little attention is paid to the effects of the regulation. Complaints are heard on all sides about delays in reaching decisions, but little or no consideration is paid to the question of how much time is enough. There is a dearth of attention to the need for policy review probably on the assumption that judicial review is sufficient.

However, any meaningful evaluation of the regulatory process should include a review of its industrial influence. Starting with the basic objectives of the regulation, analysis of economic and social effect should be foremost in evaluation. Such inquiry should relate the content of the regulation to its ultimate goals and should encompass the economic pressures within the regulated industry. At the same time, the rules should be reviewed to determine practicability and side effects.

The regulation of the television industry is in point. The goal behind the regulatory legislation seems to be to raise program levels. This objective calls for catering to minority groups that are interested in educational and cultural activities. However, raising program levels through regulation is an impossible task until we develop practical yardsticks for evaluation.

Furthermore, the economic conditions in the industry would seem to militate against educational and cultural programs. Given the limited number of channels available for television broadcasting, it seems likely that each station would find a larger listener audience by broadcasting "westerns" rather than informative and symphonic programs. Given three stations in a town, each would try to attract one-third of the "western" fans if it appeared that seventy-five per cent of the viewers wanted such programs. The alternative would be to cater to the next largest class—say, the ten per cent who are interested in symphonies.

Unless the number of channels can be increased, as in the case of radio with its good music stations, it would seem difficult to do very much about raising program quality. Therefore, it is quite possible that the underlying goals cannot be achieved by the current type of regulation. It may be practicable to force wider use of the UHF bands in order to increase the number of stations sufficiently to follow the radio pattern. Indeed, the goals of regulation might be furthered by a government-subsidized research program to increase the number of channels in use.

On the other hand, it may be preferable to discontinue the frustrating efforts to improve programming in the commercial stations. Perhaps the only effective solution would be to subsidize eleemosynary stations that are dedicated to educational and cultural programs. If such a move were considered, part of the funds could be raised through the annual fees developed by auctioning commercial licenses.

It should be noted that these illustrations are presented not as recommendations, but to demonstrate the prime need for developing criteria for evaluation that are based primarily on subject matter and only secondarily on procedure. What is the point of slavishly formulating procedures to avoid corruption if the underlying regulation provides a breeding place? What benefit is there in accelerating the process if it is headed in the wrong direction? Is there some advantage in the slow process if, as in rate regulation, it were to provide the only or major incentive for industrial efficiency?

D. Review and Generalization

Policy evaluation entails two important elements: the mechanism for policy review, and the development of appropriate levels for generalization. There are significant limitations affecting each of these functions today. Both reflect the great need to replace *a priori* argument with substantial empirical analysis.

We lack procedures for policy review. One of the main thrusts of the procedural considerations has been to develop adequate mechanisms for reviewing the work of the agencies. However, this campaign has not proceeded beyond judicial review. Little or no attention has been paid to broad policy evaluation as opposed to the case-by-case scrutiny of the courts.

The judiciary is not equipped for policy review. Judges rarely have an opportunity to consider a number of cases about the same subject at one time. They have

no basis for investigating the many problems that are handled by negotiation. They could not properly consider the relations between regulatory and nonregulatory functions.

Congressional and executive functions provide the only basis for policy review. However, we have not appreciated the need for such inquiry on a sustained, organized basis. True, there have been a goodly number of substantial investigations. However, they have been sporadic and have lacked follow-up studies. Agencies have been checked more frequently for specific incidents, for budgets, and for procedure than for substantive policy.

Some of the methods for reviewing the work of the agencies require serious reconsideration. For example, during budgetary scrutiny of the work of the Antitrust Division and the Federal Trade Commission, attention seems to be directed to the number of cases instituted and of cases won. These yardsticks have probably pushed the agencies into a type of numbers game. By prosecuting small companies in unimportant markets, it is possible to start many proceedings and to obtain many consent orders through negotiation. The effects of the proceedings can be ignored as long as there is a great deal of motion.

One of the profound problems in policy review, as well as in procedural consideration, is the determination of what generalizations are appropriate. Many conclusions are hasty generalizations based on scanty information. The bothersome question is how to know that a review of one agency or two has any application to others.

On the other hand, many have taken the position, express or implied, that each agency is unique and even that each regulatory function is *sui generis*. This attitude would allow no room for generalization or principle. It would suggest that the experience of one agency can shed no light on the problems of any other.

Differences among the agencies are important. Compare, for example, the Civil Aeronautics Board and the Federal Trade Commission. The CAB deals with a handful of carriers in competition with each other. It must consider indirect effects of almost all decisions on this competitive situation. It deals regularly with the same "constituents." In contrast, the FTC has no closed group of companies under its jurisdiction. Most of its respondents have had only one experience with the Commission. It does not have to consider a continuity of relations.

However, there are levels of generalization that are appropriate. They require careful, sustained study of many situations. They cannot be achieved by any quick, dramatic flashes. Yet, basic progress in the analysis of the regulatory process requires that we drive for appropriate generalization and avoid the precipitate, overly broad conclusion.

CONCLUSION

The regulatory process is fast becoming an ubiquitous element in national life. All signs point to further increases in government activity. The combined influ-

ences of regulation and direct government operations affect all phases of economic and social endeavor.

However, we move in this direction with heavy ambivalence. Our national tradition points to a minimum of government interference. Yet, we look to governmental solutions for the many new problems that stem from the additional complications of economic activity, greater sectional interdependence, striking technological changes, and an uncertain international situation.

Our consideration of the regulatory process is colored by anxiety. We have great difficulty in finding a straight path. The process calls for the continual balancing of many interests and the resolution of many conflicts. Hence, with changing needs and pressures, it is almost impossible to chart a stable, consistent policy course.

As a result, the practical treatment of the regulatory process requires a recognition of its complexities and its dynamic fluctuations. We do not seem destined for a clear, resolute path in any phase of regulation. Unless and until we accept these underlying conditions, we will continue to seek the simple maxims that do not meet the complex analysis that the process requires.

In this setting, it would appear that much of our preoccupation with procedural problems simply permits us to avoid the tough policy issues. Unfortunately, settling issues of procedure and organization will not take care of the basic needs of the regulatory process. Procedures do have important influences. They can affect the equities and efficiencies of government activity. They can either help us to resolve policy issues or hinder such resolution. However, they do not constitute the sole feature of our regulatory pattern, and they avoid the important consequences of other types of governmental activity.

Above all, we need further empirical research and broad analysis to clarify how regulation works. We require a clearer understanding of where the process fits into the complex of our economic, political, and social goals. We should have more definitive information of just how the participants in the process function. We badly need a broader view of the basic issues that deserve attention.

A LAWYER'S VIEW OF ADMINISTRATIVE PROCEDURE—THE AMERICAN BAR ASSOCIATION PROGRAM

ROBERT M. BENJAMIN*

In lectures delivered three years ago at the University of Virginia Law School, and published a year later by the Virginia Law Review Association, Judge Prettyman said: "The function of an administrative agency is the administration of law—no more, no less."[1] Mr. Justice Frankfurter, in a foreword to the published volume, commented: ". . . Judge Prettyman's emphasis that the function of administrative agencies is the administration of law is more than wholesome, it is essential."[2]

The interest of the bar that this field of law be administered well is but part of the bar's interest that all law be administered well; but growth and change in the range and character of administrative regulation and other administrative action have presented a special challenge to the lawyer's trained capacity for dealing imaginatively with questions of procedure. Procedures, differing as they should in different fields, are still the essential framework of the administration of law in any field.

Since the administration of law by agencies takes place in the context of government, there are special considerations. I may be permitted to quote from an official report that I submitted nearly two decades ago to the Governor of New York after studying for three years the adjudicating and rulemaking procedures of New York State administrative agencies and the New York system of judicial review:[3]

> Put in its most general terms, the problem with which this report is concerned is the problem of reconciling, in the field of administrative action, democratic safeguards and standards of fair play with the effective conduct of government. To state the problem in these terms is not to say that the elements to be reconciled are essentially opposite and

* A.B. 1917, LL.B. 1922, Harvard University. Law secretary, Mr. Justice Holmes, 1922-23. Member of the New York bar; Chairman, American Bar Association Special Committee on Code of Administrative Procedure; Member, American Bar Association Special Committee on Legal Services and Procedure; participant in in-service training courses in administrative law and member of panel on oral examinations for hearing officer positions, New York State Department of Civil Service. Formerly Member, Alien Enemy Hearing Boards, United States Department of Justice; Chairman, Regents' Committee on Discipline (review of disciplinary proceedings of licensed professions), New York State Education Department; Consultant, Committee on Uniform Rules, President's Conference on Administrative Procedure; Chairman, American Bar Association Section of Administrative Law; Chairman, Committees on Administrative Law, New York State Bar Association, Association of the Bar of the City of New York, New York County Lawyers' Association; Consultant on Administrative Law, Indian Law Institute, New Delhi. Author, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK (1942). Contributor to legal periodicals.

[1] E. BARRETT PRETTYMAN, TRIAL BY AGENCY 10 (1959). As used by Judge Prettyman, and as used in this paper, "administrative agency" includes executive departments as well as the so-called "independent agencies."

[2] *Id.* at xi.

[3] ROBERT M. BENJAMIN, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK 9 (1942) [hereinafter cited as BENJAMIN; references here and below are to the first, unnumbered, volume].

conflicting. On the contrary, each of them should contribute to the fulfilment of the other. Government effective in accomplishing the purposes of a democratic society is itself a safeguard of the democratic tradition, if not indeed a condition of its survival. The safeguards and standards of fair play can themselves contribute in great measure to the effectiveness of democratic government.

Elaborating the last sentence, my report said further:[4]

Not only the attitude and conduct of the administrator but the form of the procedures themselves should be directed to making the person dealt with feel that he is being fairly dealt with. There is more involved here than the simple desirability that this should be so. To a considerable degree, the successful operation of any procedure requires cooperative effort by all the parties. Procedure fair on its face will go far to enlist such cooperation.

This, I am sure, states a basic attitude of the bar towards the problems of administrative procedure. And in this the bar is not alone. In 1957, the Committee on Administrative Tribunals and Enquiries appointed by the Lord High Chancellor of Great Britain, known (from the name of its chairman, Sir Oliver Franks) as the Franks Committee, submitted its report.[5] This was "not primarily a legal committee";[6] Sir Oliver Franks, chairman of one of the largest British banks, had taught philosophy at Oxford and elsewhere and had been Provost of Queen's College, Oxford, and Ambassador to the United States, and a majority of the members of the Committee were not lawyers. The Franks Committee, with a felicity of expression we must envy, wrote:[7]

21. . . . Administration must not only be efficient in the sense that the objectives of policy are securely attained without delay. It must also satisfy the general body of citizens that it is proceeding with reasonable regard to the balance between the public interest which it promotes and the private interest which it disturbs. . . .

22. . . . In this country government rests fundamentally upon the consent of the governed. The general acceptability of these adjudications is one of the vital elements in sustaining that consent.

One aspect of these views may be summarized in a sentence: *The public interest, with which administrative agencies are charged, includes an interest in procedures fair to those whom they affect.* And there is more to this than "sustaining" the "consent of the governed." Fair procedures will give opportunity to those whom they affect to have their views adequately heard and considered, and to be informed of and to have opportunity to controvert opposing views. Such procedures will advance the obvious public interest that administrative action be informed and considered.

[4] *Id.* at 12.

[5] Committee on Administrative Tribunals and Enquiries, *Report*, CMND. No. 218 (1957) [hereinafter cited as CMND. No. 218].

[6] Wade, *Recent Trends in the Administrative Process in England*, 13 AD. L. REV. 27 (1960) [the *Administrative Law Review*, published by the Section of Administrative Law of the ABA, was, until vol. 13, entitled *Administrative Law Bulletin*].

[7] CMND. No. 218, at 5.

It was on this concept of the public interest that the bar played the predominant part it did in the enactment of the Administrative Procedure Act of 1946,[8] and on this concept that it has engaged since in the activities looking towards further improvement that I discuss below. This being its guiding principle, the bar is discouraged by finding occasionally attributed to its activity in this field motives of self-interest or of the narrow interest of its clients, with a suggestion that lawyers "have a vocational stake in the formalization and elaboration of procedure before regulatory agencies, because such procedure places a premium upon the services which lawyers are trained and equipped to provide."[9]

Such depreciation of the bar's motives is better answered than ignored. I may testify first from experience. I have worked closely for over a decade with those in the American Bar Association principally concerned with its program for the improvement of administrative procedure, and I have found among my colleagues no narrow or self-interested motive. But I need not rely on such testimony. The support of the bar for shortening and simplifying hearing proceedings through the development of pretrial conference techniques and the extension of pretrial procedures in federal agencies[10] is one short and concrete answer. I take another instance from my New York experience:

Following a recommendation in my 1942 report to the Governor of New York,[11] the New York State Bar Association and the Association of the Bar of the City of New York achieved the amendment of article six, section seven, of the New York Constitution (in 1951) and of section 589 of the New York Civil Practice Act (in 1952) to permit the Court of Appeals (our highest court) to grant leave to appeal from non-final orders of the Appellate Divisions in proceedings instituted by or against administrative agencies. This reform, carried through by bar associations, was motivated wholly by the interest of administrative agencies in solving a problem of theirs summarized thus in a report of the Committee on Administrative Law of the Association of the Bar:[12]

> Under existing law, when the Appellate Division reverses a determination of an administrative agency and by a non-final order remits the matter to the agency for further proceedings, the agency must (except in the limited instances referred to in the next paragraph) either acquiesce in the Appellate Division's determination or ask the Appellate Division for leave to appeal on certified questions; its power to appeal thus depending upon

[8] 60 Stat. 237, 5 U.S.C. §§ 1001-11 (1958).

[9] Heady, *The New Reform Movement in Regulatory Administration*, 19 Pub. Admin. Rev. 89, 99 (1959).

[10] See, *e.g.*, Comm. on Improvement of Administrative Procedures, *Report*, 4 Ad. L. Bull. 121, 123 (1952); *Agenda of Annual Meeting*, 5 *id.* at 65 (1953); Comm. on Improvement of Administrative Procedures, *Report*, *id.* at 108.

[11] Benjamin 366-68.

[12] The Committee's report is unpublished; it was approved by action of the Association in December 1949. *Jurisdiction of Court of Appeals on Appeals from Non-Final Orders in Proceedings Involving Administrative Agencies*, Ass'n of the Bar of the City of New York Yb. 284 (1950). See also Comm. on Administrative Law, *Report*, 73 N.Y.S.B.A. Rep. 315, 316 (1950); Comm. on Administrative Law, *Report*, 75 *id.* at 349 (1952).

the action of the court which has rendered a determination adverse to the agency's contentions.

. . . .

Unless leave to appeal is granted by the Appellate Division on certified questions or unless the agency is willing and able to file a stipulation for final order absolute, the agency is thus obliged to comply with the determination of the Appellate Division, even though it may involve important and novel questions of law, including questions of administrative procedure. Once having complied, the agency can no longer appeal from what would then be its own determination.

There could be no clearer instance of bar association action motivated solely by the public interest, without any possibility of private advantage.

The bar's concern with this misconception of its motive is more than a matter of pride. Doubt that the bar is motivated by the public interest may impede a meeting of minds with those of other disciplines in dealing with particular proposals.

The bar does not question the motives of those with whom it may find itself in disagreement. We do, however, find not infrequently that suggestions for procedural change elicit from administrators forecasts of difficulties which appear to us to be imaginary.

We are disturbed also by the building up of a *mystique,* of a personification of "the administrative process" (however that is to be defined) which enables one to characterize current differences of opinion as "the ordeal of the administrative process."[13] With foresight of this development, a colleague of mine in the American Bar Association[14] suggested a number of years ago that the oath of office[15] be amended to read: "I do solemnly swear that I will support and defend against all enemies, foreign and domestic, the Constitution of the United States and the Administrative Process. . . ."

I

THE AMERICAN BAR ASSOCIATION'S INTEREST AND ACTIVITY—GENERAL

I have so far spoken largely in general terms, which I believe to be applicable to lawyers generally. But of course the bar is not monolithic, and not all lawyers (and, I may add, not all lawyers in the American Bar Association) have the same judgment as to how the public interest, as I have defined it, is to be served. I was originally asked to write for this symposium on "the efforts of the organized bar." It will, I think, be most useful to deal from here on primarily with the current official program of the American Bar Association, in which I have participated from its inception. Before dealing with the current *legislative* program, I shall mention

[13] Kintner, *The Current Ordeal of the Administrative Process: In Reply to Mr. Hector,* 69 YALE L. J. 965 (1960).

[14] John W. Cragun, of the District of Columbia bar, my predecessor as chairman of the Section of Administrative Law and as chairman of the Special Committee on Code of Administrative Procedure, and presently vice-chairman of that committee.

[15] *Cf.* 5 U.S.C. § 16 (1958).

briefly other approaches to the solution of problems of administrative procedure that have had the Association's support.

The President's Conference on Administrative Procedure, called in 1953 and working through 1954, had been advocated,[16] and was strongly supported, by the American Bar Association. A former president of the Association, George Maurice Morris, served as vice-chairman of the Conference until his untimely death, and many members of the Association (in and out of the Government) were among those serving as members of the Conference or as consultants to its various committees.[17] For a description of the work of the Conference, I refer to the lectures by Judge Prettyman, its chairman, from which I quoted at the beginning of this paper.[18]

The Association supports also the organization, momentarily expected as this paper is written, of a successor and permanent Administrative Conference of the United States.[19] The details of organization of the new Conference are not yet known; but I shall have something to say about some aspects of its organization in my later discussion of the American Bar Association's legislative program for an Office of Administrative Procedure.

The American Bar Association has thus strongly supported, and in this and other ways[20] has participated in, efforts primarily of the administrative agencies themselves to improve procedures.

The Association has also strongly urged constant and detailed attention by the Congress to the problems of administrative procedure. At its meeting in February 1956, the same meeting at which it adopted the resolutions basic to the Association's current legislative program, the House of Delegates of the Association adopted a resolution urging the establishment by the Congress of a permanent Committee on Administrative Procedure.[21] It was, I believe, primarily due to this initiative that there was set up in the Senate Committee on the Judiciary its Subcommittee on Administrative Practice and Procedure.[22] There has been activity also in the

[16] *Proceedings of the House of Delegates*, 78 A.B.A. Rep. 347, 359 (1953).

[17] I had the honor of serving as a consultant to the Committee on Uniform Rules, and thus have first-hand knowledge of the Conference's valuable activities. The Committee on Uniform Rules concluded that uniformity was feasible and desirable in procedural rules on certain matters, and it drafted illustrative rules dealing with those matters. The Conference approved the Committee's conclusion, but without approval or disapproval of the illustrative rules. President's Conference on Administrative Procedure, Report 14-36, 67-69 (1954).

[18] Prettyman, *op. cit. supra* note 1, at 47-51.

[19] See testimony of Judge Prettyman in *Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary entitled "Federal Administrative Procedure,"* 86th Cong., 2d Sess. 8-18 (1960) [hereinafter cited as *Federal Administrative Procedure Hearings*].

[20] Committees of the Section of Administrative Law have, for example, worked informally with agencies on the revision of their procedural rules and otherwise on the improvement of their procedures. The Section membership includes, besides practising lawyers (many of whom have themselves had long experience in the agencies), lawyers now in the Government, including agency members, counsel, and hearing examiners, and teachers of law.

[21] *Proceedings of the House of Delegates*, 81 A.B.A. Rep. 369, 385 (1956).

[22] S. Res. 61, 86th Cong., 1st Sess. (1959); S. Res. 234, 86th Cong., 2d Sess. (1960). See Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, *Administrative Practice and Procedure*, S. Rep. No. 1484, 86th Cong., 2d Sess. (1960).

House of Representatives, primarily through the Committee on Government Operations and the Subcommittee on Legislative Oversight of the Committee on Interstate and Foreign Commerce; and more activity in the House is expected.[23] Representatives of the Association have actively assisted the work of these congressional committees both in investigating the performance of agency functions and in considering means of improvement.

The American Bar Association first dealt specifically with the field of administrative law in 1933, when it created a Special Committee on Administrative Law under the chairmanship of Louis G. Caldwell.[24] That Committee continued, under the chairmanship of Mr. Caldwell, Col. O. R. McGuire, Dean Roscoe Pound, and Carl McFarland, until the enactment of the Administrative Procedure Act of 1946, when it was succeeded by the Section of Administrative Law.[25] The Section has dealt with the whole range of questions that the field of administrative law includes.[26] Operating initially through specially-informed committees, it has observed and appraised the Administrative Procedure Act of 1946 in operation; it has dealt with problems arising out of new legislative proposals, sometimes supporting and sometimes opposing;[27] it has originated proposals of its own for legislative and administrative action; and it has concerned itself also with the day-to-day operation of the various administrative agencies.[28] All this provided a strong base for the Association's current legislative program.

II

THE AMERICAN BAR ASSOCIATION'S LEGISLATIVE PROGRAM

The legislative program found immediate stimulus in the reports issued in the spring of 1955 by the Commission on Organization of the Executive Branch of the Government, the Second Hoover Commission, and its Task Force on Legal Services and Procedure. I was at that time chairman of the Section of Admin-

[23] See, *e.g.*, Special Subcomm. on Legislative Oversight of the House Comm. on Interstate and Foreign Commerce, *Report*, H.R. REP. No. 2238, 86th Cong., 2d Sess. 41-42 (1961), recommending a permanent Subcommittee on Regulatory and Administrative Commissions. The House Committee on the Judiciary has set up in the 87th Congress a Special Subcommittee on Administrative Procedure.

[24] *Proceedings*, 58 A.B.A. REP. 41, 197 (1933).

[25] Special Comm. on Administrative Law, *Report*, 71 A.B.A. REP. 213 (1946). For an account of the Committee's activities during the intervening years, sufficient for present purposes, see Comm. on the Administrative Court Proposal, *Report* app. 1, "History of Federal Administrative Court Proposals in the American Bar Association," 3 AD. L. BULL. 78, 83 (1951).

[26] See, *e.g.*, the account of the Section's consideration of the question of the feasibility and desirability of uniform rules of administrative procedure, in *Uniform Rules*, 7 AD. L. BULL. 28-32 (1954); and *cf.* note 17 *supra*. The Section's *Administrative Law Bulletin*, published since 1949, reflects the wide scope of its activities.

[27] *E.g.*, in 1954-55, the Section opposed a proposal for transfer of jurisdiction of unfair labor practice cases from the NLRB to the federal district courts, partly on the ground that such transfer would impair the desirable uniformity of decision accomplished through centralized adjudication by the Board; and the House of Delegates concurred. *1955 Mid-Winter Meeting, Resolutions Proposed by Section Adopted by House of Delegates*, 7 AD. L. BULL. 43, 45 (1955); *Jurisdiction of Unfair Labor Practice Cases*, 8 *id.* at 19 (1955); *Proceedings of the House of Delegates*, 80 A.B.A. REP. 391, 399 (1955).

[28] See note 20 *supra*.

istrative Law. Detailed consideration of these Hoover Commission reports became the immediate business of the Section, initially through study by Section committees of those aspects of the reports that directly affected the subjects of their special concern. Detailed consideration continued at the 1955 annual meeting of the Section. The Council of the Section devoted an extended meeting to this subject, and all members of the Section were invited to participate; in addition, a full day of the Section membership meeting continued consideration of the reports.[29] The discussion at the Section membership meeting was recorded and reproduced for use by those concerned with the continuing study.

Meanwhile, the President of the Association had appointed a Special Committee on Legal Services and Procedure, under the chairmanship of Ashley Sellers, on which I also had the privilege of serving. The Special Committee sought and obtained the assistance of sections and committtes of the Association that had had various aspects of the problems under study over the years, and the views of the administrative agencies and of other informed persons.[30] With detailed study through subcommittees and extended consideration in full sessions, the Special Committee produced a report dated January 31, 1956,[31] proposing resolutions for adoption by the House of Delegates which would form the framework of a legislative program, and supporting those proposals with detailed comment.

The resolutions proposed by the Special Committee were adopted by the House of Delegates on February 20, 1956.[32] The first of these resolutions, taking cognizance in a preamble of both the Hoover Commission reports and the 1954 report of the President's Conference on Administrative Procedure, proposed in general terms the matters dealt with in the following resolutions, including replacement of the Administrative Procedure Act of 1946 with a Code of Federal Administrative Procedure.[33] Resolution 2 set forth matters to be taken into account in the new Code with respect to public information, rulemaking, formal adjudication, and judicial review. Resolution 3 recommended the establishment within the executive branch (but independent of any department or agency thereof) of what it referred to as an Office of Administrative Procedure and Legal Services, with a Division of

[29] See *Plans for Annual Meeting*, 7 Ad. L. Bull. 114 (1955); *Program of Annual Meeting*, *id.* at 173.

[30] For a list of those consulted, see appendix to Special Comm. on Legal Services and Procedure, *Report*, 81 A.B.A. Rep. 491, 531-33 (1956). So far as concerns sections and committees of the ABA, the list is incomplete in the sense that officers of other sections and committees were themselves members of the Special Committee.

[31] Special Comm. on Legal Services and Procedure, *Report*, 81 A.B.A. Rep. 491 (1956).

[32] *Proceedings of the House of Delegates*, 81 A.B.A. Rep. 369, 371-84 (1956).

[33] The text of Resolution 1 is as follows:

"1. *Resolved*, That the American Bar Association is of the opinion that a comprehensive reexamination should be undertaken at this time of the Administrative Procedure Act of 1946 and related matters, including detailed consideration of and provision for more adequate public information on the procedures and operation of Federal agencies, improvements in the processes of agency rule-making, better assurance of fair and expeditious hearing and determination of agency cases, and improvements in judicial review of agency action; and to these and other ends advocates replacing the Administrative Procedure Act with a Code of Federal Administrative Procedure and undertaking the other reforms set forth in the following resolutions." Special Comm. on Legal Services and Procedure, *supra* note 31, at 491.

Administrative Procedure, a Division of Hearing Commissioners, and a Division of Legal Services; subresolutions (3.1, 3.2, and 3.3) dealt with implementation by the Office of the proposals of the President's Conference on Administrative Procedure, administration by the Office of revised laws with respect to a corps of hearing commissioners, and a newly-to-be-established legal career service for civilian attorneys in the Government. Resolution 4 recommended the establishment, in the judicial branch, of specialized courts (or divisions of a specialized court) "to have original jurisdiction in specified cases . . . in areas presently subject to administrative action equivalent to judicial action in courts of general jurisdiction"; to such courts would be transferred (a) from the Federal Trade Commission and certain other agencies adjudication of cases in the trade practice field, (b) from the National Labor Relations Board adjudication of representation and unfair labor practice cases, and (c) "such other adjudicatory functions as the Congress may from time to time determine." Resolution 4.1 recommended transfer of the Tax Court of the United States to the judicial branch. Resolution 5 dealt with representation before agencies by lawyers and non-lawyers, including provision for disciplinary control by a Federal Grievance Committee of lawyers engaged in such practice. Resolution 6 dealt with legal services in the Department of Defense.[34] Resolution 7 conferred on the Board of Governors (which acts for the American Bar Association during intervals between the semi-annual meetings of the House of Delegates) authority to determine how the first six resolutions should be implemented.[35] The Board of Governors conferred implementing authority on the Special Committee on Legal Services and Procedure.[36]

To carry out the drafting of legislation, the Special Committee set up advisory groups. Each of the advisory groups, under the chairmanship of a member of the Special Committee, included representatives of interested sections and committees of the Association. The drafting process varied among the advisory groups; the

[34] The function of implementing Resolution 6 was ultimately withdrawn from the Special Committee on Legal Services and Procedure at its own instance. Special Comm. on Legal Services and Procedure, *Report*, 84 A.B.A. REP. 427, 429-30 (1959); *Proceedings of the House Delegates*, 85 *id.* 297, 334 (1960). Since the subject matter is in any event remote from the purposes of this paper, I shall have no more to say about that resolution.

[35] As originally proposed by the Special Committee, Resolution 7 called for its discharge; but that provision was eliminated by the House of Delegates.

[36] Board of Governors, *Report*, 81 A.B.A. REP. 210 (1956). The text of the Board's resolution is:

"*Resolved*, That, until further order, the Board of Governors of the American Bar Association hereby confers upon the Special Committee on Legal Services and Procedure authority to take such action as may be necessary to seek the implementation of the recommendations proposed by said committee in its report of January 31, 1956, as adopted by the House of Delegates on February 20, 1956, such authority to include, but not to be limited to, the right to appear before Congressional committees in support of the principles approved by the action of the House, to participate in the drafting of necessary legislation to implement said principles, and to delegate to other appropriate committees and sections of the Association the responsibility of carrying out such specific tasks in connection therewith as the Special Committee may determine to be proper.

"*Resolved, Further*, That the authority hereby conferred upon the Special Committee may be exercised by a subcommittee of not more than six of its members to be designated by its Chairman, which subcommittee shall act primarily as a steering committee with the remaining members of the Special Committee acting in an advisory capacity."

Section of Administrative Law was enlisted by the Advisory Group on Resolution 2 to prepare the initial draft of the proposed Code of Federal Administrative Procedure; other advisory groups prepared their own initial drafts. However the initial drafts were prepared, they were studied and revised by the advisory groups and, in turn, by the full Special Committee, with interchanges of view between the groups and the Committee.[37] Having participated in this process,[38] I can say that I have never known a more diligent and responsible effort of legislative draftsmanship.

With the completion of the drafting process, the Special Committee on Legal Services and Procedure took on the function of seeking in behalf of the Association enactment of the proposed legislation. For this purpose, there were created by the Board of Governors *ad hoc* special committees to deal severally with the several bills, and the Special Committee on Legal Services and Procedure was reconstituted to consist of its chairman and the chairmen of the several *ad hoc* committees.[39] The present *ad hoc* committees are the Committees on the Code of Administrative Procedure, on Courts of Special Jurisdiction, on the Federal Administrative Practice Act, and on a Permanent Congressional Committee on Administrative Procedure. The last-named, it will be observed, is not, like the others, concerned with a particular bill; it was created by the Board of Governors in 1958[40] to carry further the Association's advocacy of the establishment of such a congressional committee,[41] and, having this function, it was thought appropriate that it should be a constituent of the Special Committee on Legal Services and Procedure.

I should mention also one further recent activity of the Special Committee on Legal Services and Procedure not included in the recommendations made by the Committee in its January 31, 1956, report. In February 1959, the House of Delegates authorized the Special Committee and the Section of Administrative Law to further the adoption of legislation to deal with *ex parte* influence on agency adjudication.[42] The Special Committee delegated its part in this enterprise to the constituent *ad hoc* Committee on the Federal Administrative Practice Act (as authorized by the House of Delegates). As is well known, this has been for the last several years a subject of

[37] Further detail with respect to the drafting process will be found in the report of the Special Committee to the 1957 Midyear Meeting of the House of Delegates. Special Comm. on Legal Services and Procedure, *Report*, 82 A.B.A. REP. 485 (1957).

[38] During the drafting process, I was chairman of the Advisory Group on Resolutions 4 and 4.1, and served also as a member of the Special Committee and of its steering committee. See last paragraph of note 36 *supra*. During the initial period of the Special Committee's activity, I had been chairman of a subcommittee dealing with the question of revising the Administrative Procedure Act of 1946 and a member of the drafting committee charged initially with preparing the report of the Special Committee dated Jan. 31, 1956.

[39] Board of Governors, *Report to the House of Delegates*, 82 A.B.A. REP. 214, 215-16 (1957). See also the report of the Special Committee to the House of Delegates at the 1957 Annual Meeting. Special Comm. on Legal Services and Procedure, *Report*, 82 A.B.A. REP. 346 (1957). As I have noted, note 34 *supra*, the *ad hoc* Committee on Defense Department Legal Services was ultimately abolished at its own request and the request of the Special Committee.

[40] Board of Governors, *Report to the House of Delegates*, 83 A.B.A. REP. 273, 276 (1958).

[41] See note 21 *supra* and related text.

[42] *Proceedings of the House of Delegates*, 84 A.B.A. REP. 502, 522-25 (1959).

active consideration in the Congress[43] and of widespread public interest. I shall not deal with it in this paper, though I shall have occasion to mention it in the course of comment on the separation-of-functions provision of the proposed Code of Federal Administrative Procedure, which concerns internal *ex parte* influence.

Before I take up specific discussion of the Association's legislative program, there are general points to be made.

We should like our program to be judged by what we propose and not by what someone else has proposed. Because our current legislative program found its immediate stimulus in the Hoover Commission reports, there has been a tendency to attribute to the American Bar Association everything that the Hoover Commission or its Task Force proposed and the rationale advanced by them for everything they proposed. As the later discussion will make clear, such attribution is incorrect.

We should hope also that criticism of our proposals would avoid use of tendentious and ambiguous words like "judicialization" and "formalization," and would be directed to the merits in detail of what we actually propose.[44]

In my 1942 report to the Governor of New York, I wrote:[45]

> What I have referred to as the democratic safeguards and standards of fair play have been developed over the course of centuries under the protection of the courts of England and America. While the forms of judicial procedure are not to be literally applied in the administrative field, the experience which they reflect can furnish criteria that may be usefully applied in many instances.

The teachings of judicial experience, that is, may be usefully suggestive in considering the most appropriate procedures for administrative adjudication; they will not be conclusive. That is the approach reflected in the American Bar Association's proposals. If one proposal or another is thought, on the merits, to follow a judicial analogy too far, there is a legitimate subject for discussion. Discussion and understanding will not be furthered by general assertions that the proposals are for "judicialization" of the administrative process; general assertions that the proposals are directed to "formalizing" administrative procedures[46] are in the same category.

[43] See, *e.g.*, S. 2374, H.R. 6774, 86th Cong., 1st Sess. (1959); H.R. 12731, 86th Cong., 2d Sess. (1960); House Comm. on Interstate and Foreign Commerce, *Independent Regulatory Agencies Act of 1960*, H.R. REP. No. 2070, 86th Cong., 2d Sess. (1960); H.R. 351, 87th Cong., 1st Sess. (1961); *Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary entitled "Administrative Procedure Legislation,"* 86th Cong., 1st Sess. (1959) [hereinafter cited as *Administrative Procedure Legislation Hearings*]; Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, *Administrative Practice and Procedure*, S. REP. No. 1484, 86th Cong., 2d Sess. (1960); *Hearings Before the Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce on Investigation of Regulatory Commissions and Agencies*, 85th Cong., 2d Sess. (1958); *id.*, 86th Cong., 1st Sess. (1959); *Hearings Before the Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce on Ex Parte Communications and Other Problems (Federal Power Comm'n)*, 86th Cong., 2d Sess. (1960).

[44] For a different reason, I do not agree with too frequent references to "due process" in behalf of the Association's proposals. Many forms of procedure are consistent with constitutional due process, and the most satisfactory may call for much more than constitutional due process alone would require.

[45] BENJAMIN 12

[46] See note 9 *supra* and related text.

I should point out here, lest it be lost in the later discussion regarding the proposed Code of Federal Administrative Procedure, the basic point that the Administrative Procedure Act of 1946 does not require, and the Code would not require, formal administrative hearing procedures in any instance; they provide only what the procedures should be *if* the Congress by statute, or the Constitution,[47] requires that there be a formal hearing. Thus, if it is thought that inquiry by the Civil Aeronautics Board into the desirability of new routes and new services would be better carried out through some type of informal proceeding,[48] the Congress could presumably so provide.[49]

A final preliminary point: What I have already said about the American Bar Association's other activities (for example, through the Section of Administrative Law, in support of the President's Conference on Administrative Procedure, and in encouraging increased activity by the Congress in the field of administrative procedure) should be enough to make it clear that the Association's legislative program is not advanced as sufficient in itself to solve all the problems of federal administrative procedure. The Association does believe that its legislative program is sound and will help immensely in moving towards valid solutions. Indeed, the first element of the program that I propose to discuss—which includes the proposal for an independent Office of Administrative Procedure[50]—looks to setting up what would in itself be a dynamic force for continuing improvement in administrative procedure.

III

The Federal Administrative Practice Act

The Federal Administrative Practice Act[51] is based on Resolutions 3 and 5 of the resolutions adopted by the House of Delegates of the American Bar Association on February 20, 1956. It has four major titles: title I—"Office of Federal Administrative Practice"; title II—"Hearing Commissioners"; title III—"Legal Career Service"; title IV—"Admission to and Control of Practice." Titles III and IV (and title V—"General Provisions"), important as they are, have not sufficient bearing on the subject of this symposium to justify discussion here. I shall, then, confine myself to titles I and II.

Proposals for an Office of Administrative Procedure[52] date back to the report of the Attorney General's Committee on Administrative Procedure, which recom-

[47] See Wong Yang Sung v. McGrath, 339 U.S. 33, 50-51 (1950).

[48] See James M. Landis, Report on Regulatory Agencies to the President-Elect 41-42 (1960) [this report has been published as a committee print by the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 86th Cong., 2d Sess. (1960)]. *Cf.* Friendly, *A Look at the Federal Administrative Agencies*, 60 Colum. L. Rev. 429, 442 (1960).

[49] I would see no constitutional impediment here.

[50] The proposed statute, the Federal Administrative Practice Act, provides for an "Office of Federal Administrative Practice." In view of the history and present status of other similar proposals, it will be more convenient to refer to this as an "Office of Administrative Procedure," or simply as the "Office"; and I accordingly do so in this paper.

[51] S. 600, 86th Cong., 1st Sess. (1959); H.R. 349, 87th Cong., 1st Sess. (1961).

[52] See note 50 *supra*.

mended an Office headed by a board composed of a justice of the United States Court of Appeals for the District of Columbia, the Director of the Administrative Office of the United States Courts, and a Director of Federal Administrative Procedure to be appointed by the President with the advice and consent of the Senate.[53] The Committee suggested advisory committees to the Director, composed of representatives of the agencies and of the public.[54] As to functions, the Committee wrote:[55]

> In general, it should be the major function of the Director to examine critically the procedures and practices of the agencies which may bear strengthening or standardizing, to receive suggestions and criticisms from all sources, and to collect and collate information concerning administrative practice and procedure. . . . [N]ot the least of the difficulties which have confronted the orderly development and understanding of administrative procedure is the absence of detailed information and study. . . . Knowledge and regularization of procedures should go far toward creating that confidence in the administrative process which is necessary for its successful functioning.
>
> In addition to these general duties of investigation and collection of data, the Committee recommends . . . that there be vested in the Office of Administrative Procedure important duties with respect to the selection and removal of hearing commissioners. . . .

The proposals of the American Bar Association in the Federal Administrative Practice Act bear strong resemblance to the proposals of the Attorney General's Committee. The Office would be "an independent agency in the executive branch of the Government" (section 101). At the head of the Office would be the Director; he and a Deputy Director would be appointed by the President with the advice and consent of the Senate (section 102).[56] The Director would designate an advisory committee composed of representatives of the agencies and of the public (section 108). The Act spells out functions in more detail than the Committee did, and in some respects (as with functions under the Federal Register Act) goes beyond what the Committee recommended; but there is still strong resemblance. Under section 110(b) of the Act, the Office would:

> (1) carry on continuous studies of and make recommendations regarding the adequacy of the procedures by which agencies determine the rights, duties, or privileges of persons;
>
> (2) carry on continuous studies of and make recommendations regarding the adequacy of the procedures by which agencies exercise rulemaking and adjudicatory functions;
>
> (3) carry on continuous studies of the adequacy of public information practices and procedures of the agencies related to rulemaking and adjudication;
>
> (4) initiate consultative and cooperative efforts among the agencies and interested organizations for development and adoption, wherever feasible and appropriate, of uniform rules of practice and procedure;

[53] Attorney General's Comm. on Administrative Procedure, *Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess. 123 (1941).

[54] *Ibid.*

[55] *Id.* at 123-24.

[56] The Director would be appointed for a term of ten years and the Deputy Director for five years (§ 103). Under the Director, each division of the Office dealing with one of its several major functions would be supervised by an Assistant Director, appointed by and reporting to the Director (§ 104).

(5) receive complaints regarding matters of practice and procedure and make investigations or recommendations as deemed appropriate;

(6) furnish assistance and advice upon request of any agency;

(7) examine the state of hearing dockets of agencies, secure information as to the agencies' need of assistance and prepare statistical data and reports on agency proceedings;

(8) perform the duties and functions vested in the Administrator of General Services and Federal Register Division under the Federal Register Act;

(9) study and make recommendations upon methods of organization appropriate for the separation of agency functions.

And under section 110(d), the Office would undertake special studies and make recommendations on subjects including:

(1) ways and means of minimizing undue delay and expense of agency proceedings;

(2) the feasibility of establishing a Federal reporter service covering agency decisions with current advance sheets, and a reporter service for agency practice and procedure decisions;

(3) methods for simplifying and reducing the cost of the agency hearing records and of agency records before the courts of appeal including incorporation, physically or by reference, without further printing of agency decisions and initial decisions;

(4) the feasibility of making the Code of Federal Regulations current by some loose-leaf system and making the whole service or any part or subpart thereof available nationwide on subscription;

(5) the feasibility of correlating and annotating agency regulations with the related substantive provisions of statute or treaty and a periodic recodification of the rules for deletion of stale or obsolete regulations;

(6) procedures especially appropriate for multiparty proceedings, particularly in the fields of ratemaking or price regulation;

(7) procedures and methods for effective participation by the public in agency rule-making proceedings;

(8) the desirability of a uniform statute for judicial review of agency proceedings and the adequacy of statutory provisions on judicial review;

(9) promulgation of a single code of rules on those subjects which are found acceptable for uniform application among the several agencies;

(10) the adequacy of agency law libraries and their management to improve the efficiency of Government legal services;

(11) improvements in the form of agency applications, reports or questionnaires of the type which relate to agency proceedings.

In further (though not complete) resemblance to the recommendations of the Attorney General's Committee,[57] the Director would, under title II of the Act, also administer new provisions with respect to a corps of hearing commissioners (a subject with which I shall deal below).

Meanwhile, two other proposals for an Office had been made—one by the President's Conference on Administrative Procedure,[58] and the other by the Second

[57] For the full recommendations of the Attorney General's Committee with respect to hearing commissioners, see Attorney General's Comm. on Administrative Procedure, *supra* note 53, at 46-51.

[58] President's Conference on Administrative Procedure, *op. cit. supra* note 17, at 3-4, 46-48.

Hoover Commission.[59] The functions proposed, though in some respects more limited, were similar to some of those I have been discussing;[60] but the President's Conference and the Hoover Commission differed from the Attorney General's Committee and the American Bar Association in recommending that the Office be in the Department of Justice.

In 1957, an Office of Administrative Procedure was set up in the Department of Justice by order of the Attorney General.[61] As John F. Cushman, then Director of the Office, testified before the Senate Subcommittee on Administrative Practice and Procedure, this was an "interim" or "experimental office," which would "fill the gap . . . until such time as the Congress saw fit to act."[62] The experiment has been valuable in many ways, as the three annual reports so far issued by the Office attest;[63] but the question remains as to the most effective form of organization of an Office.

The Office proposed by the American Bar Association would have no power to compel action by any of the administrative agencies with whose procedures it would deal; its powers would be limited to examination and to advice and persuasion.[64] It is, we believe, essential to the most successful operation of such an Office that the Director have status equal to, and be independent of, those with whom he will deal, and that he have authority to examine into whatever he finds relevant to his inquiries. In support of these views I can cite Walter Gellhorn, Director of the Attorney General's Committee, who testified before the Senate Subcommittee on Administrative Practice and Procedure:[65]

> I think that the director of that office should be a person of great stature and significant power, with the capacity to obtain all papers and files bearing on any matters that he was concerned with looking into . . . .

My own experience in New York bears out these views.[66] My study there was as

[59] COMM'N ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, REPORT ON LEGAL SERVICES AND PROCEDURE 82-84 (1955) [hereinafter cited as HOOVER COMM'N REPORT].

[60] See PRESIDENT'S CONFERENCE ON ADMINISTRATIVE PROCEDURE, *op. cit. supra* note 17, at 3, recommending that:

". . . the Office perform the following functions:

"(i) carry on continuous studies of the adequacy of the procedures by which Federal agencies determine the rights, duties, and privileges of persons;

"(ii) initiate cooperative effort among the agencies and their respective bars to develop and adopt as far as practicable, uniform rules of practice and procedure;

"(iii) collect and publish facts and statistics concerning the procedures of the agencies;

"(iv) assist agencies and this Conference in the formulation and improvement of their administrative procedures."

[61] Order 142-57, 22 Fed. Reg. 998 (1957). The order stated the functions of the Office in almost the same terms as those proposed by the President's Conference, quoted in note 60 *supra*.

[62] *Administrative Procedure Legislation Hearings, supra* note 43, at 213, 220.

[63] OFFICE OF ADMINISTRATIVE PROCEDURE, OFFICE OF LEGAL COUNSEL, U.S. DEP'T OF JUSTICE, ANN. REP. (1957, 1958, 1959).

[64] The same is true of the other recommendations I have discussed, except that the Hoover Commission would have given some powers of compulsion—*e.g.*, with respect to "simplification, clarification, and uniformity of rules." HOOVER COMM'N REPORT 83.

[65] *Federal Administrative Procedure Hearings, supra* note 19, at 120.

[66] In my report to the Governor, I made, independently of the Attorney General's Committee though

a representative of the Governor under what is known as the Moreland Act,[67] which authorizes the Governor, through persons appointed by him, to examine and investigate the affairs of any state agency, and confers power of subpoena (which I never used). I am sure that my status, equal to that of the administrators with whom I dealt, and my authority to examine whatever I thought relevant, had much to do not only with my ability to carry out effectively the study with which I was charged, but also with the degree to which my recommendations were effective.

The British view is, I think, also relevant. The Franks Committee recommended, in a somewhat narrower field, the setting up of a Council on Tribunals to be appointed by the Lord Chancellor and the Secretary of State for Scotland;[68] and this recommendation was given effect in the Tribunals and Inquiries Act, 1958.[69]

I have mentioned before the momentarily-expected organization of an Administrative Conference of the United States, and the support that the American Bar Association accords to that project. Warm as our welcome is, we must at the same time state an emphatic view that an Administrative Conference cannot take the place of an independent Office of Administrative Procedure; that the work of the two organizations would be complementary, and that to resort to either one, to the exclusion of the other, would be to lose much of the value that the other could contribute.

The President's Conference on Administrative Procedure, in 1953 and 1954, was predominantly a conference of the agencies; and when the organization of the new Administrative Conference becomes known, it will doubtless appear that the agencies will have an important, if not a predominant, part there also. Self-examination and self-criticism are of the greatest value, but they cannot take the place of the detached examination and detached criticism that an independent Office of Administrative Procedure would supply; cross-criticism in a conference of equals of like position is perhaps the least likely to be advanced effectively or accepted.

I have had experience in New York with a somewhat similar organization, the Conference of Administrative Counsel constituted in 1948 of the general counsel (or their representatives) of the State's agencies having most to do with adjudication, which met periodically to consider procedural questions of mutual concern. That Conference, in my judgment, fell far short of what my proposed Division of Administrative Procedure[70] could be expected to accomplish.

The difference in effectiveness is not due solely to the difference between self-examination and self-criticism and detached examination and detached criticism. Conferences of this kind cannot engage in the continuous, day-to-day work that

shortly thereafter, a like recommendation for a Division of Administrative Procedure in the Executive Department of New York. Benjamin 18-21.

[67] N.Y. Executive Law § 6 (then § 8).

[68] Cmnd. No. 218, at 10, 30-31.

[69] 6 & 7 Eliz. 2, c. 66. For an account, by a member of the Council, of its activities during its first year, see Wade, *supra* note 6; see also Council on Tribunals, First Report (1960).

[70] See note 66 *supra*.

would be expected of an Office. The New York Conference of Administrative Counsel met, generally, monthly. The new Administrative Conference of the United States would, it is likely, meet only twice a year.[71] Committee work, and even the likely provision for a Council, would still, in my view, not supply the necessary continuity.

It appears likely also that the organization of the new Administrative Conference will include transfer to the Conference, as its secretariat, of the present Office of Administrative Procedure in the Department of Justice.[72] Certainly the Conference will need a permanent secretariat, and transfer of the Office from the Department of Justice will make excellent provision in that regard. It could well continue, in its subordinate status as secretariat, its statistical work and some of its other present activities. But in other respects its transfer to a subordinate position in the Conference would make even more urgent the setting up of the independent Office of Administrative Procedure that the American Bar Association advocates.

I return now to the functions of our proposed Office, under title II of the Federal Administrative Practice Act, with respect to hearing commissioners.

With a "grandfather clause" for incumbent trial examiners (section 202), the Director would fix qualifications for hearing commissioner positions, subject to statutory minima (section 204); he would appoint qualified hearing commissioners and, upon consultation with the agency concerned, assign them to authorized hearing commissioner positions in the several agencies (section 203).[73] Provision would be made for tenure during good behavior, and for removal by the Director (on his own motion or on complaint) only for good cause established after opportunity for hearing, with opportunity for judicial review (sections 205, 207). Substantial compensation would be provided for (section 206). An old argument about rotation of cases among trial examiners[74] would be resolved by requiring that each agency, upon consultation with the Director, adopt regulations for the systematic assignment of cases among hearing commissioners (section 211).

This is, I believe, a sound and workable solution of problems of long standing.[75] Its basic purpose is to achieve what Dean Landis calls "the extremely important goals of maintaining the independence and integrity of the hearing examiners and of evolving a corps of highly qualified examiners. . . ."[76] (I shall have more to say about the functions of hearing commissioners in the portion of this paper dealing with the proposed Code of Federal Administrative Procedure.) The Association

[71] See Judge Prettyman's testimony, *Federal Administrative Procedure Hearings, supra* note 19, at 9.

[72] *Id.* at 17; Mr. Cushman's testimony, *Administrative Procedure Legislation Hearings, supra* note 43, at 217; LANDIS, *op. cit. supra* note 48, at 73, 87.

[73] Such assignments would be "on a continuing basis subject only to reassignment by the Director as efficiency of operations or the needs of the service may require" (§ 203).

[74] See Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128 (1953).

[75] I need not deal here with disagreements within the President's Conference of 1953-54 as to how the problems should be solved, or with other recommendations beyond those of the Attorney General's Committee to which I have already referred (see notes 55 and 57 *supra* and related text).

[76] LANDIS, *op. cit. supra* note 48, at 73.

agrees with Dean Landis also that "the Civil Service Commission is not fundamentally organized to handle this problem."[77] We part with Dean Landis only when he suggests that the functions to be removed from the Civil Service Commission should be assigned to the secretariat of the Administrative Conference of the United States.[78] The necessarily subordinate position of the secretariat in a Conference consisting largely, if not predominantly, of representatives of the agencies would, we believe, impair the proper independence of the hearing commissioners which Dean Landis agrees with us in seeking.

Since I have been dealing with means of assuring the high quality of personnel engaged in administrative adjudication (and to some extent in rulemaking), it is appropriate to mention here another recent non-legislative activity of the American Bar Association. In 1957, the Association set up a Special Committee on Administrative Agency Appointments "to promote the nomination and confirmation of competent lawyers as members of federal independent agencies and commissions and to oppose the nomination and confirmation of lawyers deemed by it to be not sufficiently qualified."[79] It had first been ascertained that the White House would welcome this step. The Committee acts only on the request of the Executive, and acts also in recognition of the fact that not all agency members will be lawyers and that additional qualifications besides legal competence are often required of agency members who are lawyers.

IV

Specialized Courts

Resolution 4 of the resolutions adopted by the House of Delegates recommended (it will be remembered) the establishment, in the judicial branch, of specialized courts (or divisions of a specialized court) "to have original jurisdiction in specified cases . . . in areas presently subject to administrative action equivalent to judicial action in courts of general jurisdiction."[80] The rationale of this recommendation is stated in the comment on Resolution 4 in the report dated January 31, 1956, of the Special Committee on Legal Services and Procedure, from which I quote:[81]

> Where the machinery of administrative action is essentially the machinery of litigation and adjudication, in substance equivalent to judicial adjudication, the arguments for a full separation of functions are strongest and those against that course weakest.
>
> The primary argument for transfer of such adjudicatory functions from agencies to courts is that litigation and adjudication, as such, can be done better by judicial than by

[77] *Ibid.*

[78] *Id.* at 73, 87.

[79] Board of Governors, *Report to the House of Delegates*, 82 A.B.A. Rep. 214, 218 (1957); see also as to this and the following text, Special Comm. on Administrative Agency Appointments, *Report*, 83 A.B.A.Rep. 420 (1958).

[80] See page 210 *supra*.

[81] Special Comm. on Legal Services and Procedure, *Report*, 81 A.B.A. Rep. 491, 513 (1956).

administrative bodies, with better assurance of considered action and a greater confidence on the part of the litigants that they are being impartially dealt with.

The primary argument against such a separation of functions is that it would unduly impede administrative responsibility and effectiveness. That argument is entitled to prevail where administrative action is essentially regulatory. The argument is, however, not properly applicable where the administrative action is in essence not regulatory but adjudicatory in the judicial sense and where such adjudication is not an integral part of a larger regulatory process.

The argument is made, also, that transfer of adjudicatory functions to the courts would be at the expense of an expertness in adjudication in specialized fields. That argument is met by vesting adjudication in such specialized fields in specialized courts. Specialized expertness can, moreover, be furthered in appropriate instances through the process of specialized litigation in which the administrative agency, familiar with the field and with adequate powers of investigation, can present all relevant factors for consideration by the specialized court.

The dividing line suggested by the recommended resolution is between functions essentially adjudicatory in the usual sense and those essentially regulatory. The two areas of adjudication presently recommended for transfer to a specialized court or courts fall within the first category. Other transfers should be effected as the Congress explores the field and finds other adjudicatory functions to be within that category.

The rationale, in brief, is that courts and court procedure (including the procedural treatment of the parties) are better adapted to adjudication than are agencies and agency procedure, and that the combination in an agency of the functions of litigation and adjudication is not acceptable as a matter of policy in such instances (though it is justified where the proper and effective conduct of a regulatory function requires it).

The Special Committee report, and Resolution 4 of the House of Delegates, had left open the question whether there should be a single specialized court, with divisions, or several specialized courts. In the drafting process, the Advisory Group on Resolutions 4 and 4.1, and the Special Committee on its recommendation, decided in favor of separate courts;[82] and there were therefore drafted a Trade Court Act[83] and a Labor Court Act[84] (in addition to a Tax Court Act[85] pursuant to Resolution 4.1). Resolution 4 had decided that the Trade Court and the Labor Court should be (as the Tax Court is) courts of original jurisdiction, that is, trial courts, whose final orders and judgments would be subject to review by the United States Courts of Appeals.[86] Some years before, the Section of Administrative Law, with the concurrence of the Section of Judicial Administration and the Standing Committee on Jurisprudence and Law Reform, had disapproved a bill to create an Administrative

[82] The Hoover Commission report had recommended a single Administrative Court of the United States, with a Tax Section, a Trade Section, and a Labor Section. HOOVER COMM'N REPORT 86-88.

[83] S. 1275, 86th Cong., 1st Sess. (1959).

[84] S. 1273, 86th Cong., 1st Sess. (1959).

[85] S. 1274, 86th Cong., 1st Sess. (1959).

[86] The Hoover Commission report had left open the question whether the Trade Section and Labor Section of the Administrative Court it recommended should have original or appellate jurisdiction. HOOVER COMM'N REPORT 88.

Court of the United States which would have superseded the regular United States courts in the judicial review of administrative agency action;[87] the present Special Committee report, citing these views and the like views of the Judicial Conference of the United States, concluded "that appellate jurisdiction had best be left unchanged."[88]

The Court Acts themselves, being in the form of detailed amendments of title 28 of the United States Code, "Judiciary and Judicial Procedure," and of the statutes presently governing agencies whose adjudicatory jurisdiction (or some of it) would be transferred to the respective specialized courts, are difficult to read, and could not be adequately summarized within the confines of this paper.[89] Nor do I think that any purpose would be served by statement here of detailed provisions with regard to the organization and procedure of these courts. The issue on which argument has centered is as to the soundness of the American Bar Association's basic position that adjudication of the character specified in Resolution 4 should be handled by specialized courts and not by agencies. It will, I think, be useful in this context to discuss, illustratively, the proposal embodied in the Trade Court Act. I select this for discussion partly because I am thus enabled, using the lawyer's expedient of incorporation by reference, to curtail greatly what I would otherwise have to say by referring to a recent article by my colleague Raoul Berger on the application of the Trade Court proposal to the Federal Trade Commission.[90] I select the Trade Court proposal also because it seems to me, individually, to present the issue on the merits even more clearly than the Labor Court proposal (though in my report to the Governor of New York I recommended a similar division of the functions of the New York State Labor Relations Board between two independent boards).[91]

Agency adjudicatory functions to be transferred from agencies to the newly-to-be-created United States Trade Court were selected by the Special Committee and its advisory group to conform to the Special Committee's carefully limited criteria.[92] They include all the adjudicatory functions of the Federal Trade Commission (under section 11 of the Clayton Act,[93] under section 5 of the Federal Trade Commission Act, and under other special acts, *e.g.*, the Wool Products Labeling Act, administered by the Federal Trade Commission); they include also adjudicatory

[87] See *The Proposal for an Administrative Court for Judicial Review (S. 488, 84th Cong.)*, 8 AD. L. BULL. 20 (1955); *Report of Committee on the Administrative Court Proposal*, 3 AD. L. BULL. 78 (1951). It should be noted that, since these views were not at the time submitted to the House of Delegates or the Board of Governors for action, they did not become official views of the American Bar Association.

[88] Special Comm. on Legal Services and Procedure, *Report*, 81 A.B.A. REP. 491, 512 (1956).

[89] For convenient reference, the text of the Trade Court Act has been printed by the American Judicature Society, 41 J. AM. JUD. SOC'Y 24 (1957).

[90] Berger, *Removal of Judicial Functions from Federal Trade Commission to a Trade Court: A Reply to Mr. Kintner*, 59 MICH. L. REV. 199 (1960). Mr. Berger is chairman of the ABA Special Committee on Courts of Special Jurisdiction.

[91] BENJAMIN 44 *et seq.*, where at the same time I oppose transfer of adjudicatory functions of agencies involved in what is in a true sense regulatory action.

[92] See note 81 *supra* and related text.

[93] Clayton Act § 11 provides for proceedings to enforce compliance with §§ 2, 3, 7, and 8 of that Act.

functions of the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board, and the Federal Reserve Board under section 11 of the Clayton Act, adjudicatory functions of the Civil Aeronautics Board under section 1381 of the Federal Aviation Act (formerly section 411 of the Civil Aeronautics Act), and adjudicatory functions of the Secretary of Agriculture under sections 203, 204, and 205 of the Packers and Stockyards Act. They exclude, on the other hand, other adjudicatory functions the inclusion of which had been recommended by the Hoover Commission Task Force.[94]

The adjudicatory functions to be transferred to the Trade Court concern unfair, deceptive, and discriminatory trade practices, unfair methods of competition, restraint of trade, and the like. The issues litigated in such cases are familiar justiciable issues. The machinery of present agency action in dealing with these issues is the machinery of litigation and adjudication. In such litigation and adjudication the agencies do not "regulate" or "administer" in any sense in which I can understand those words.

In every case in the Trade Court, the agency whose adjudicatory jurisdiction had been transferred to the Court would be the petitioner.[95] The present agency functions of investigation (of particular cases and general fields), of determining which cases should be litigated, and of preparing and presenting those cases in litigation would be left undisturbed. These functions would be carried on more effectively by an agency concerned with them alone, and not involved also in the conflicting function of adjudication. In the course of litigation, the expertness of the investigating and litigating agency could be brought to bear fully in its presentation to the Court.

As to adjudication, it is clearly better done by a court, whose business is adjudication, than by an agency in which that is only one of diverse functions. Courts would deal better not only with the substance of adjudication, but also with litigating procedures. I refer for example to a proceeding, discussed in Raoul Berger's article,[96] in which the Federal Trade Commission vacated a stipulation which had been entered into with the approval of the trial examiner. The Commission noted that a stipulated limitation of proof might interfere with the success of "counsel supporting the complaint"[97] in establishing his case; and, equating his success with "the public interest," it set the stipulation in that regard aside. This must, I believe, be shocking not only to lawyers. It may be asked, also, how parties are to be expected to expedite cases by stipulation if any part of a stipulation that favors them may later be set aside on such a ground.

[94] COMM'N ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, TASK FORCE REPORT ON LEGAL SERVICES AND PROCEDURE 380, 391-92, 392-93, 393-94, 394-95 (1955) [hereinafter cited as TASK FORCE REPORT].

[95] The jurisdiction (in the district courts) of actions by the United States under Clayton Act § 15, and the jurisdiction of private actions under § 16, would not be transferred to the Trade Court.

[96] Berger, *supra* note 90, at 210-11.

[97] I have always been struck by this self-conscious way of referring to the Commission's counsel litigating before it.

I have one further comment regarding procedure: It has been argued, especially in behalf of the Federal Trade Commission,[98] that to transfer the adjudicatory function to a court would impede the disposition of cases by voluntary compliance, stipulation, or consent order, a settlement process which now disposes of a large proportion of Federal Trade Commission cases. I see no reason why proper settlement of cases should not continue as effectively after transfer of the adjudicatory function to the Trade Court; and I note the frequency of consent decrees in antitrust litigation by the Department of Justice in the courts. If there would be any reduction in the number of settlements, it could only be because of pressure now implicit in the fact that the agency that prosecutes will ultimately decide, and thus holds the sword of ultimate adjudication over those from whom it seeks consent settlements. If that is the cost of more settlements, the cost is too high. This was among the factors supporting my own 1942 recommendation for the separation between two independent boards of the functions of the New York State Labor Relations Board.[99]

I have stated at the beginning of this section the rationale that supports the Association's Trade Court proposal. I should add here that this proposal is *not* based on the circumstance, relied on to some extent by the Hoover Commission Task Force,[100] that cease-and-desist orders resemble the injunctive relief granted by courts.[101]

I have voiced above[102] objection to the charge that the American Bar Association proposes "judicialization" of the administrative process. Certainly the proposals for transfer to specialized courts of carefully-limited instances of administrative adjudication are proposals for judicialization. They are not, however, proposals for judicialization of what in my view can properly be called an "administrative process."

V

The Code of Federal Administrative Procedure

The proposed Code of Federal Administrative Procedure[103] implements Resolutions 1 and 2 of the House of Delegates.[104] The Code reflects a responsible and considered effort of draftsmanship, informed by more than a decade of experience under the Administrative Procedure Act of 1946, which it would supersede. The 1946 Act was never presented as a final solution of all the problems with which it dealt, but only as a major step towards solution, which would be subject to reappraisal in the light of experience. Nor is the Code itself presented by the American Bar

[98] See, *e.g.*, Kintner, *supra* note 13, at 976.

[99] Benjamin 51-53, 56-57.

[100] *E.g.*, Task Force Report 245-46, 253.

[101] That circumstance proves no more than that court action for such relief is *appropriate*; it does not tend to establish that transfer to a court is *desirable*.

[102] See page 212 *supra*.

[103] S. 1070, 86th Cong., 1st Sess. (1959); S. 1887, 87th Cong., 1st Sess. (1961).

[104] See page 209 *supra*.

Association as a final text, to be accepted without change;[105] nobody expects a statute of this scope to come out of the Congress in the exact form in which it was introduced.[106] We welcome suggestions; and our Committee on the Code has already concluded that some suggestions for revision, made since the Code was introduced, should be accepted. But if the Code is not to be enacted in its exact initial form, it is at the very least a sound framework for needed revision of the 1946 Act.

It has been argued, in agency comment on our bill, that any changes in the 1946 Act should be made by specific amendments, rather than by the general revision that we propose. General revision, the argument is, would create uncertainties and induce litigation. This argument is inconsistent with the commendable practice of agencies themselves in periodic complete revision of their own procedural rules. It assumes, moreover, more present certainty than there in fact is; the number of court decisions dealing with the interpretation and effect of the 1946 Act is large. Piecemeal amendment would, I suggest, do more to create uncertainties and inconsistencies[107] than one single effort of consistent and precise draftsmanship.

In August 1959, the Senate Committee on the Judiciary requested agency comment on the proposed Code. The comment, received by the late spring of 1960, was made available by the Senate Subcommittee on Administrative Practice and Procedure to our Committee on the Code. We concluded that we should have assistance in full and objective consideration of the agency comment, which would be useful to the Senate Subcommittee as well as to us. To that end, we retained three professors of law as a Committee of Consultants,[108] who could begin their detailed work during the 1960 summer period. Their report, completed in late January 1961, was reproduced, and copies were transmitted in February to the Senate Subcommittee[109] and made available to others who requested them.[110]

At the end of the introduction to their report, the Committee of Consultants stated their general conclusion:

> The central conclusion of the study is that the agency responses, although they are in general critical of the Code in many respects, do not disclose that substantial revisions in the Code are necessary or desirable, and do leave substantially unimpaired the arguments for its enactment into law.

[105] See *Federal Administrative Procedure Hearings, supra* note 19, at 105.

[106] Experience with the enactment of the Administrative Procedure Act of 1946 would belie any such expectation.

[107] Amendment of one provision might require correlative amendment of another, which might well be overlooked.

[108] The Committee consisted of Leo A. Huard, Dean of the University of Santa Clara College of Law, Chairman; Rex A. Collings, Jr., of the University of California School of Law; and Winston M. Fick, of Claremont Men's College and Claremont Gradaute School.

[109] As to the Senate Subcommittee's interest in this report, see *Federal Administrative Procedure Hearings, supra* note 19, at 56-58, 105.

[110] Copies have been filed in the Law Library of Congress. For access to the comparatively small number of remaining copies, inquiry may be made of the Washington office of the American Bar Association, 1120 Connecticut Ave., Washington 6, D.C.

While this is their general conclusion, the report of the Committee of Consultants finds some of the detailed agency comment justified, and itself makes suggestions for revision of the Code text. A number of these our Committee on the Code has already determined to accept.

The next step should, I think, be hearings before the Senate Subcommittee, on the Code text,[111] agency comment thereon, and the Consultants Committee report. Conferences with representatives of the agencies could also be useful, especially if the number were small enough to permit detailed consideration of the Code text. The Director of an Office of Administrative Procedure could, ideally, correlate agency views for such a conference. I doubt that the form of organization of the new Administrative Conference of the United States would lend itself to effective consultative procedure on the text of a statute of this scope.

I have said above that proposals of the Hoover Commission and its Task Force on Legal Services and Procedure are not properly to be attributed to the American Bar Association; and what I said applies to the Code. The Task Force drafted an "Administrative Code"[112] that included in its first two titles[113] a proposed revision of the Administrative Procedure Act of 1946. The Hoover Commission transmitted the Task Force Administrative Code to the Congress, though without endorsement.[114] The Task Force proposal was, of course, among the matters studied by the Association's Special Committee on Legal Services and Procedure; but our proposed Code, as anyone who compares the three documents must agree, differs more from the Administrative Code proposed by the Task Force than it does from the 1946 Act.

Our own Code is to be judged on its merits. The reach of the Code is so wide, and its provisions so detailed, that full discussion would be impossible within the limits of this paper. I proceed to discuss illustratively the reasons for major proposals.

A. Public Information

Section 3 of the 1946 Act[115] was intended to provide adequate public information with respect to the product of agency rulemaking and adjudication; but in practice agencies have on occasion justified restrictive information practices by reference to this very section (and to 5 U.S.C. § 22). In 1956, after long study and hearings

[111] The Senate Subcommittee has held no hearings directed to the specific provisions of S.1070. The hearings of July and November 1959, *Administrative Procedure Legislation Hearings*, were on S. 2374, see note 43 *supra* and related text; and on title I of S.600, see note 51 *supra* and related text. The hearings of November and December 1960, *Federal Administrative Procedure Hearings*, *supra* note 19, were held not to consider particular bills in detail, *id.* at 2, but to consider a wide range of problems of administrative procedure, with incidental but not detailed consideration of particular bills.

[112] Task Force Report 359 *et seq.*

[113] Title I—"Definitions"; title II—"Procedure." The remaining titles were: III—"Office of Legal Services and Procedure"; IV—"Administrative Court of the United States"; V—"Hearing Commissioners"; VI—"Appearance and Representation"; VII—"General Provisions."

[114] *E.g.*, Hoover Comm'n Report 51, 95.

[115] 60 Stat. 238, 5 U.S.C. § 1002 (1958).

by its Special Subcommittee on Government Information, the House Committee on Government Operations reported:[116]

Clarification of statutes.—The Congress has a duty to clarify the chaotic and confusing situation existing with respect to title 5, United States Code, section 22, and title 5, United States Code, section 1002. Action is required in order to spell out the intent of Congress and to insure a freeing rather than a freezing of information. It is believed that Congress intended to establish a full and complete flow of information from the Government to the people, but the fact remains that misinterpretation of congressional intent exists. A major effort is being made to develop specific legislative language concerning these two statutes. . . .

The basic purpose of section 1002 of the Code, "Public Information," is to cure this misapprehension of the congressional intention.

In 1957 and again in 1959, Senator Hennings introduced a bill to amend section 3 of the 1946 Act;[117] the Hennings bill resembles generally section 1002 of our proposed Code, but with changes. Our Committee on the Code considered carefully the differences between the Hennings bill and ours, and determined that we should accept some (though not all) of the changes. I cannot go into detail here; but a memorandum of our conclusions in this regard was furnished in May 1959 to the staff of the Senate Subcommittee on Administrative Practice and Procedure and the staff of the House Special Subcommittee on Government Information.[117a]

Here, as elsewhere in the Code, proposals which may be opposed by some agencies are motivated by what we believe to be essentially in their own interest as well as in the public interest as I defined it at the beginning of this paper. It will, I think, be useful to refer again in this connection to the article by H. W. R. Wade, a member of the British Council on Tribunals, to which I have already referred for an account of that Council's activities during its first year.[118] The House of Lords, in the *Arlidge* case,[119] had upheld the general practice of refusing publication of reports to ministers by inspectors who had conducted local inquiries. The Franks Committee recommended that such inspectors' reports be disclosed.[120] Mr. Wade writes:[121]

. . . But now at last the change has been made, the reports are made available, and we are glad to find the Chief Inspector of the Ministry of Housing and Local Government saying in print that the new practice has markedly improved public relations. . . .

[116] House Comm. on Government Operations, *Availability of Information from Federal Departments and Agencies*, H.R. REP. No. 2947, 84th Cong., 2d Sess. 93 (1956). 5 U.S.C. § 22 was amended in 1958 to add: "This section does not authorize withholding information from the public or limiting the availability of records to the public." 72 Stat. 547.

[117] S.2148, 85th Cong., 1st Sess. (1957), S.186, 86th Cong., 1st Sess. (1959).

[117a] On April 12, 1961, Senator Carroll, chairman of the Subcommittee on Administrative Practice and Procedure, introduced for himself and others S.1567, 87th Cong., 1st Sess., to amend § 3 of the 1946 Act. The new bill resembles in many respects, though in a few respects it differs from, § 1002 of the proposed Code with the changes we had determined to accept following our consideration of the Hennings bill.

[118] Wade, *supra* note 6, and see note 69.

[119] Local Government Board v. Arlidge [1915] A.C. 120.

[120] CMND. No. 218, at 97.

[121] Wade, *supra* note 6, at 33.

B. Rulemaking

I should mention first the change that the Code would effect in the definition of "rule" and "rulemaking." Section 1001(c) reads:

> (c) Agency Rule and Rulemaking.—"Rule" means the whole or any part of every agency statement of general applicability and future effect implementing, interpreting, or declaring law or policy, or setting forth the procedure or practice requirements of any agency. "Rulemaking" means agency process for the formulation, amendment, or repeal of a rule.

Section 2(c) of the 1946 Act[122] includes in its definition statements of *particular* (as well as general) applicability (and future effect), and includes specifically the approval or prescription for the future (whether generally or in particular application) of "rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing."

The basis for the definition in the 1946 Act is, I assume, that the matters it includes are legislative in nature. The rationale of the draftsmen of the Code is that we are dealing with a procedural statute; that in this context procedural requirements, not concepts of the nature of administrative action, are what count; and that where the procedure must be quasi-judicial,[123] a procedural statute should define the action as adjudication.[124]

The instances in which rules (as defined by the Code) are required to be made on the record of a prescribed hearing are relatively few. I confine discussion here to procedures for participation in *informal* rulemaking by those who would be affected by the rules. The purpose is, as I have suggested earlier in more general application, not only fairness to those whose interests may be severely affected, but also assurance that the administrative action will be informed and considered.

The provisions of section 4 of the Administrative Procedure Act of 1946[125] for public notice of proposed rulemaking and public participation in the rulemaking process are in effect limited to substantive rules, and even as to substantive rules are not applicable "in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."

Under section 1003 of the Code, public notice and public participation would be required in the making of procedural and interpretative, as well as substantive, rules. The exceptions would be only for matters required to be kept secret in the protection

[122] 60 Stat. 237, 5 U.S.C. § 1001(c) (1958).

[123] See Morgan v. United States, 298 U.S. 468, 479-81 (1936).

[124] Both the 1946 Act and the Code in effect define "adjudication" as whatever final agency action is not "rulemaking." Administrative Procedure Act of 1946, § 2(d), 60 Stat. 237, 5 U.S.C. § 1001(d) (1958); Code § 1001(d).

[125] 60 Stat. 239, 5 U.S.C. § 1003 (1958).

of the national security; rules relating to public property, loans, grants, benefits, or contracts to the extent that the agency finds that the delay or expense would be disproportionate to the public interest; and rules relating solely to internal management.

The requirements of the 1946 Act for public notice and public participation in informal rulemaking are, it seems clear, much too narrow, both in the interest of those affected and in the wider public interest in sound administrative action. To make sure, on the other hand, that the broader requirements of the Code do not hamper prompt and effective administration, the Code provides for "temporary or emergency rules,"[126] which, under specified criteria, may be adopted without the prescribed notice and public participation but will have effect for not more than six months unless extended in accordance with the regular notice and participation requirements. This is, I believe, a sound solution.

Besides these major provisions, section 1003 of the Code contains a number of procedural improvements, including, for example, provisions that agencies must adopt and publish rules of procedure for rulemaking; must keep a rulemaking docket so that those affected may at all times be aware of what rulemaking is in process; and must deal effectively with petitions for the issuance, amendment, or repeal of rules.[127] While these are of less consequence, they are still important in insuring the benefits of outside participation in the informal rulemaking process.

C. Formal Adjudication

I select for discussion two major features—the increased status the Code would confer on the hearing commissioners provided for by the Federal Administrative Practice Act, and the Code's extension of the separation-of-functions provisions of the 1946 Act.

1. *Hearing commissioners*

The Code provides that in every case in which a hearing commissioner presides (that is, in all but the rare cases where the agency itself or an agency member or a board specifically authorized by statute may preside),[128] the hearing commissioner shall make an initial decision, which in the absence of an appeal to the agency or a review upon motion of the agency will become the decision of the agency;[129] and it provides further that, upon agency review of the initial decision, a hearing commissioner's findings of evidentiary fact (as distinguished from ultimate conclusions of fact—and of course from questions of agency policy) shall not be set aside by the agency unless such findings are contrary to the weight of the evidence.[130] Under section 8(a) of the 1946 Act,[131] in contrast, the agency may take for its own initial

[126] § 1003(d).

[127] While the 1946 Act provides for such petitions, there has been too wide experience that petitions when filed disappear from sight.

[128] § 1006(a).

[129] §§ 1006(b)(10), 1007(b). Under § 1003(b), the requirement that a hearing commissioner make an initial decision is not applicable to formal rulemaking.

[130] § 1007(c).

[131] 60 Stat. 242, 5 U.S.C. § 1007(a) (1958).

decision a case heard by a trial examiner and, even where it is reviewing an initial decision of a trial examiner, the agency may substitute its own decision (decisions of evidentiary fact included) for that of the examiner.[132] The Code[133] would also give to the hearing commissioner more control over the proceeding before him than hearing examiners in many agencies now have.

The increased status that the Code would thus confer on hearing commissioners would go far to improve responsible administrative adjudication, permitting the hearing officer to whom a case has been directly presented by evidence and argument to play his proper part in the final determination.

It is widely recognized that too much time of agency members is spent on adjudication, impeding the proper exercise of their other functions and causing in some agencies extreme delays in the adjudication process itself. One solution is for an agency to provide in effect for final adjudication by qualified hearing officers in run-of-the-mill cases, with the agency exercising discretionary power of review where more is involved than questions of fact and where the novelty or importance of the other questions involved makes final adjudication by the agency appropriate.[134] The high quality of hearing commissioners assured by title II of the Federal Administrative Practice Act, and the provisions of the Code that I have just discussed, conferring adequate powers on hearing commissioners, would contribute greatly to making such procedure practicable.

2. *Separation of functions*

I have mentioned above,[135] though without discussion, the widespread interest in bills to curb *ex parte* influence on agency adjudication. Those bills deal with influence brought to bear on the agency from the outside. The problem of internal *ex parte* influence would be dealt with in the Code by its provisions requiring separation of functions in the process of agency decision.

The separation-of-functions provisions of the 1946 Act, section 5(c),[136] are inapplicable "in any manner to the agency or any member or members of the body comprising the agency." The Code would extend its separation-of-functions provisions, section 1005(c), to the agency and agency members.[137] The portion of section 1005(c) applicable to agency members is as follows:

. . . Except upon notice and opportunity for all parties to be present or to the extent required for the disposition of ex parte matters as authorized by law, no such presiding or deciding officer or agency or member of an agency acting pursuant to sections 1006 and

[132] This is subject only to the fact that on judicial review the trial examiner's report may be taken into account by the reviewing court in determining the sufficiency of the evidence to support the agency's determination. Universal Camera Corp. v. NLRB, 340 U.S. 474, 492-97 (1951).

[133] § 1006(b) and (c).

[134] See, *e.g.*, *Federal Administrative Procedure Hearings*, *supra* note 19, at 100-01; LANDIS, *op. cit. supra* note 48, at 85.

[135] See notes 42 and 43 *supra* and related text.

[136] 60 Stat. 240, 5 U.S.C. § 1004(c) (1958).

[137] Under § 1003(b), the separation-of-functions provisions of § 1005(c) are not applicable to formal rulemaking.

1007 of this Act shall consult with any person or party on any issue of fact or law in the proceeding, except that, in analyzing and appraising the record for decision, any agency member may (1) consult with other members of the agency in cases in which the agency is making the decision, (2) have the aid and advice of one or more personal assistants, (3) have the assistance of other employees of the agency who have not participated in the proceeding in any manner, who are not engaged for the agency in any investigative functions in the same or any current factually related case and who are not engaged for the agency in any prosecutory functions.

The provision, it will be observed, permits agency members adequate assistance "in analyzing and appraising the record for decision," but it closes the door to influence within the agency, permissible under the 1946 Act, on agency members who decide cases. Without such restriction, responsible adjudication, in which evidence and argument and counter-evidence and counter-argument of the parties can be brought to bear openly and effectively on the matters to be decided, is impossible.

Much is made, by those who support the process of what is called "institutional decision," of the expertness of agencies. Certainly agencies have, especially on their staffs, many experts. The question is how this expertness is to be used, in the public interest as I have suggested it should be defined, in the process of administrative adjudication. Certainly it can, and I think it should, be used openly on the record. To permit it to be used off the record, not merely in analyzing and appraising the record for decision but rather in derogation of or in substitution for or in addition to the record evidence, is a wholly different matter. One basic consideration here is that expert opinion or "knowledge," insulated against being critically reviewed and controverted, cannot be trusted to arrive always at the right result.

It is accepted doctrine that evidence not in the record must not be taken into account in the decision.[138] It is accepted doctrine also that an agency may, in the decision process, use its expert knowledge and experience in evaluating and drawing conclusions from the evidence that is in the record.[139] The line is not always easy to draw.[140] That makes it all the more important that the statute call upon agencies to do their best in drawing the line.

D. Judicial Review

In New York, the availability of judicial review of administrative action, formal or informal,[141] is the norm; and the view that administrative action should almost always be subject to the judgment of a reviewing court that the agency has stayed within the bounds of its authority, that its action within those bounds has conformed to procedural requirements, and that it has reached a rationally supportable conclusion, is a view not confined to lawyers outside the government. Thus when the

[138] United States v. Abilene & Southern Ry. Co., 265 U.S. 274, 286-90 (1924).

[139] See ICC v. Louisville & Nashville R.R., 227 U.S. 88, 98 (1913).

[140] See BENJAMIN 206 *et seq.*, esp. 210.

[141] As to New York review of informal administrative action by a proceeding "in the nature of mandamus," and as to the few instances of action not subject to such review, see *id.* at 351 *et seq.*

New York Court of Appeals construed section 34 of the Insurance Law to exclude judicial review of matters other than those explicitly stated in the statute to be "subject to judicial review,"[142] the succeeding Superintendent of Insurance himself obtained a curative amendment by the Legislature.[143]

The general availability of judicial review in New York has not impeded effective administration; nor (in view of the accepted limitations on the scope of judicial review, which tend to discourage resort to the courts) have the courts been overburdened with review proceedings.

The proposed Code is, I believe, wise in providing that every "final agency action" shall, "except as expressly precluded by Act of Congress hereafter enacted," be subject to judicial review.[144] Reconsideration on the merits of the existing exemptions will require justification on clear grounds of policy if the exemption is to be continued;[145] exemptions which cannot meet that test will not be continued by inertia or by the practical difficulty of piecemeal amendment of particular statutes.

General availability of judicial review does not, especially in the federal courts, mean that review will be obtained in every instance in which it is sought. There may still stand in the way a variety of doctrines, especially the doctrines of "standing to sue" and "ripeness for review."[146]

I may usefully refer at this point to a discussion of the proposed Code before the District of Columbia Bar Association three years ago, in which I had the pleasure of participating with Clark Byse.[147] Mr. Byse said at one point that he thought the effect of the Code was to give agencies and the judiciary a "nudge here and a nudge there,"[148] and I accepted this as a happy characterization.[149]

This figure of speech of Mr. Byse's applies neatly to the Code's treatment of the doctrine of "standing to sue"—in Mr. Justice Frankfurter's words, a "complicated specialty of federal jurisdiction."[150] The Code provision is:[151]

> Standing to Seek Review.—Any person adversely affected or aggrieved by any such reviewable agency action shall have standing to seek judicial review thereof, except where expressly precluded by Act of Congress hereafter enacted.

[142] Matter of Guardian Life Ins. Co. v. Bohlinger, 308 N.Y. 174, 124 N.E.2d 110 (1954), *reargument denied*, 308 N.Y. 810, 125 N.E.2d 867 (1955).

[143] N.Y. Sess. Laws 1956, ch. 932, amending § 34 to read in part:

> "Notwithstanding the specific enumerations of the right to judicial review in this chapter, any order, regulation or decision of the superintendent is declared to be subject to judicial review as permitted in a proceeding under article seventy-eight of the civil practice act. . . ."

[144] § 1009(a).

[145] Where such grounds exist, the agency should have no difficulty in presenting them to the Congress.

[146] See, as to the complexities of these doctrines, Kenneth Culp Davis, Administrative Law Treatise §§ 21.01-22.18 (1958).

[147] The substance of this discussion is reported in Smalley, *The Federal Administrative Procedure Act: Its Accomplishments and Proposals for Amendments*, 5 Fed. B. News 138 (1958).

[148] *Id.* at 139.

[149] *Ibid.* I did not agree with the implied answer to his further question, whether the cumulative effect of the nudges "was not a shove."

[150] United States *ex rel.* Chapman v. FPC, 345 U.S. 153, 156 (1953).

[151] § 1009(b).

This simple and direct statement[152] would, I believe, convey to the courts an effective indication of congressional intent that, for example, they go further than they have done in finding "standing" wherever the one seeking review is adversely affected in fact by agency action, and that they be slow to deny "standing" on the ground that no "legal right" of the one seeking review has been infringed. I welcome support in this view from Robert Kramer,[153] who (though he criticizes various provisions of the Code) finds that this provision would "clarify the ambiguity of the present language" of the 1946 Act, and seems "highly desirable."[154] Of course no statutory provision, however explicit, could require the courts to find "standing" or "ripeness" where they do not find a "case" or "controversy," necessary to confer jurisdiction under article 3, section 2, of the Constitution.

The doctrine of "ripeness for review" is not, I believe, capable of statutory formulation even in suggestive form; and the Code attempts none. The Code's suggestive treatment of "standing" may, however, suggest to the courts greater liberality also in finding "ripeness" than they have always shown.

Besides broadening the availability of judicial review, the Code makes a valuable contribution by providing for a review proceeding in the United States district court of appropriate jurisdiction, except where a particular statute provides for judicial review in a specified court.[155] This section is useful also in providing that review proceedings may be brought against the agency, individuals who comprise the agency, or "any person representing the agency or acting on its behalf in the matter sought to be reviewed in the judicial district where the defendant resides or wherein the act or omission complained of occurred."[156]

One new provision of the Code authorizing judicial action has met opposition, in my view clearly mistaken. Section 1009(g) provides in part:[157]

> PROCEEDINGS IN EXCESS OF JURISDICTION.—Upon a showing of irreparable injury, any Federal court of competent jurisdiction may enjoin at any time the conduct of any agency proceeding in which the proceeding itself or the action proposed to be taken therein is clearly beyond the constitutional or statutory jurisdiction or authority of the agency. If the court finds that any proceeding contesting the jurisdiction or authority of the agency is frivolous or brought for the purpose of delay, it shall assess against the petitioner in such proceeding costs and a reasonable sum for attorneys' fees (or an equivalent sum in lieu thereof) incurred by other parties, including the United States.

[152] Compare § 10(a) of the 1946 Act, 60 Stat. 243, 5 U.S.C. § 1009(a) (1958):
"RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

[153] Later Assistant Attorney General in charge of the Office of Legal Counsel.

[154] Kramer, *The Place and Function of Judicial Review in the Administrative Process*, 28 FORD. L. REV. 1, 35 (1959).

[155] § 1009(c). Compare § 10(b) of the 1946 Act, 60 Stat. 243, 5 U.S.C. § 1009(b) (1958); and see Kramer, *supra* note 154, at 35-36.

[156] See Smalley, *supra* note 147, at 141; *cf.* Blackmar v. Guerre, 342 U.S. 512 (1952).

[157] See also a related provision of § 1005(a), authorizing like injunctive action with respect to investigations.

This used to be the law,[158] though without the safeguard provided by the second quoted sentence. The proceeding is, in essence, the familiar New York proceeding "in the nature of prohibition,"[159] which (with its predecessor, the historic writ of prohibition) has been in effect for many years without disruption of the administrative process. Those who object to the Code provision fail, I believe, to recognize that an injunction would lie only if the proposed action were "clearly" beyond the agency's jurisdiction or authority. The cases in which that could be shown to the satisfaction of the court would be cases in which the remedy ought to be available to avoid the "irreparable injury" which the court must also find.

I mention, finally, two provisions regarding the scope of judicial review.

Section 1009(f)(7) of the Code would substitute, in the review of determinations of fact in formal adjudication, a "clearly erroneous" test for the present test of "substantial evidence on the whole record." As to this, having myself expressed a differing view in the 1956 report of the Special Committee on Legal Services and Procedure,[160] I confine myself to justifying the proposal as (in Byse's phrase) a "nudge" to the courts to apply the substantial evidence test to its fullest permissible extent.[161]

Section 1009(f) of the Code provides also that the reviewing court

> . . . shall determine all questions of law and interpret the statutory and constitutional provisions involved and shall apply such interpretation to the facts duly found or established.

This provision is intended, in part, to overrule the doctrine of *Gray v. Powell*[162] and *National Labor Relations Board v. Hearst Publications, Inc.*,[163] which I have discussed elsewhere as "judicial deference to quasi-judicial statutory interpretation."[164] I must refer to that discussion here, quoting only my conclusion that the doctrine "accomplishes little of affirmative value that could not be accomplished by the established doctrine that courts, free to reach their own conclusions on statutory interpretation, will nevertheless give weight to an administrative interpretation," while

[158] Skinner & Eddy Corp. v. United States, 249 U.S. 557, 562-63 (1919).

[159] Benjamin 360 *et seq.*

[160] Special Comm. on Legal Services and Procedure, *Report*, 81 A.B.A. Rep. 491, 529-30 (1956).

[161] Similarly, the provision of § 1006(d) of the Code, requiring the application in formal adjudication, to the extent practicable, of the rules of evidence applicable in civil nonjury cases in the district courts (a provision as to which I also expressed differing views, *id.* at 528-29), might be justified as a "nudge" to the agencies to formulate the rules of evidence that they will apply in practice, instead of leaving their own evidence practices wholly at large. See Benjamin 178-81. I should add that this evidence provision of § 1006(d) is not applicable to formal rulemaking or to "cases of adjudication involving the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances thereof, or valuations, costs, or accounting, or practices bearing upon any of the foregoing"; in such cases, "any reliable and probative evidence" is to be received.

[162] 314 U.S. 402 (1941).

[163] 322 U.S. 111 (1944).

[164] Benjamin, *Judicial Review of Administrative Adjudication: Some Recent Decisions of the New York Court of Appeals*, 48 Colum. L. Rev. 1, 12 *et seq.* (1948).

it involves the danger "that administrative tribunals, free to adopt any rationally supportable interpretation of the governing statute, will be freed of the ultimate legal controls which have been a useful, no less than a traditional, part of our system of administrative law."[165]

It had been thought by some, myself included, that section 10(e) of the 1946 Act[166] would be effective to overrule the doctrine. It did not have that effect; and I believe that this is the time to try, more explicitly, again.

VI

CONCLUDING MISCELLANY

I repeat that the American Bar Association's legislative program is not advanced as sufficient in itself to solve all the problems of federal administrative procedure. To put this paper in perspective, I conclude here with disconnected comment on a few of the questions to which, in discussing that program, I have not had occasion to refer. These are largely matters of agency organization and procedure with which I would expect our proposed Office of Administrative Procedure, and in some instances the new Administrative Conference of the United States, to deal. In the following comment I refrain, generally, from suggesting solutions.

There is the question of combining in an agency legislative and adjudicatory functions. The basic argument for doing so is that administrative legislation and adjudication are part of a single process, where policy may first be developed in a series of adjudicatory proceedings and then, as it crystallizes, may be profitably generalized into rules. Doubt has been cast on this combination of functions by recently publicized instances of *ex parte* influence on adjudication. Legislative activity, it is said, must be carried on not in isolation but in frequent consultation and informal contact with those subject to regulation. But the very questions that are later the subject of adjudication may thus have been discussed informally at an earlier time; and to draw the line against *ex parte* influence at the point where actual adjudication begins is in such circumstances unrealistic.

There is a question whether agencies should not go further than they have done in determining policy by rulemaking as soon as that is practicable, rather than continuing, after that point of practicability is reached, the process of developing policy by adjudication. The advantage to those subject to regulation of knowing in advance the criteria according to which they will be regulated is obvious. The difficulty is in determining the point at which the formulation of rules is practicable.

There is, so far as I can see, no way in which agencies can be forced to crystallize policy in rules, even when it would clearly be practicable to do so. If an agency

[165] *Id.* at 14.
[166] 60 Stat. 243, 5 U.S.C. § 1009(e) (1958).

wants to rely on a rule in support of its action, it must of course promulgate the rule;[167] if it does not want that support, it cannot be forced to do so. Whether it should not in good conscience do so is another matter. If, for example, an agency has formulated instructions to its subordinate personnel how to deal with matters affecting those subject to regulation, I have difficulty in finding justification for concealing from those regulated the substance of what has been concluded by such instructions.

It has been suggested that, with the modern techniques of data-processing, many of the questions now dealt with in extended rulemaking or adjudicating proceedings could be more efficiently dealt with in that way.[168] I would still ask who determines, and by what process he determines, what data are to be fed into the data-processing machine and what formula the machine is to apply to those data.

There have been undertaken in recent years a number of management surveys of agency activities. I would conclude, with the reference to Judge Prettyman with which I began, by saying that administrative regulation is more than management.

Addendum

This article was substantially completed in early April. I note here, briefly, some of the developments since.

On April 13, the President issued an Executive Order[169] establishing the Administrative Conference of the United States "to assist the President, the Congress and the administrative agencies and executive departments in improving existing administrative procedures." The Conference consists of a Council of eleven members named by the President, one of whom—Judge Prettyman—he has designated as Chairman of the Conference, and "a general membership from Federal executive departments and administrative agencies, the practicing bar, and other persons specially informed by knowledge and experience with respect to Federal administrative procedures." The composition of the general membership, not less than fifty in number, is to be determined by the Council; "at least a majority of the total membership shall be from Federal executive departments and administrative agencies." Research and staff assistance are to be furnished by the Office of Administrative Procedure in the Department of Justice, and the Director of that Office acts as Executive Secretary of the Conference. The Conference is required to make a final report to the President no later than December 31, 1962, "summarizing its activities, evaluating the need for further studies of administrative procedures, and suggesting appropriate means to be employed for this purpose in the future." Provision is made for studies by Conference committees, and for participation in the activities of the Conference by

[167] See Code § 1002(e), which provides in part:

"No rule . . . shall be relied upon or cited against any persons unless it has been duly published or made available to the public in accordance with this section."

[168] See *Federal Administrative Procedure Hearings, supra* note 19, at 28.

[169] Exec. Order 10934, 26 Fed. Reg. 3233 (1961).

interested committees of the Congress. The Conference has already entered on its activities, from which much of value is to be expected.[170]

On April 14, the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary issued a second report.[171] I do not undertake here to summarize the report, but set forth in a footnote the report's own summary statement of its nine recommendations.[172]

Following the Subcommittee's recommendation "to increase the prestige and power of hearing examiners,"[173] Senator Carroll, chairman of the Subcommittee, introduced on April 27[174] S. 1734, 87th Cong., 1st Sess., to amend sections 7 and 8 of the Administrative Procedure Act of 1946, primarily to provide that in formal adjudication and formal rulemaking the officer who presides shall make an initial decision which, in the absence of review by the agency, shall become the decision of the agency, and to provide that review by the agency shall be only upon one or more of grounds specified in the bill. The Code of Federal Administrative Procedure proposed by the American Bar Association provides for the initial-decision procedure in formal adjudication, but not in formal rulemaking.[175] I have expressed above[176] approval of the procedure of final adjudication by qualified hearing officers in run-of-the-mill cases, with the agency exercising discretionary power of review where

[170] See, *e.g.*, note 19 *supra* and related text.

[171] Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, *Administrative Practice and Procedure*, S. REP. No. 168, 87th Cong., 1st Sess. (1961) [hereinafter cited as S. REP. No. 168].

[172] "I. The subcommittee recommends the enactment of a statute to give legislative ratification of the existing power of the President to promulgate an ethical code governing the conduct of Government employees and providing sanctions for the violation of that code." *Id.* at 3.

"II. The subcommittee recommends the enactment of a statute containing both criminal and civil sanctions prohibiting improper ex parte communications." *Id.* at 4.

"III. The subcommittee recommends that there be established in the White House an Office of Administration and Reorganization with adequate personnel and an adequate budget." *Id.* at 5.

"IV. The subcommittee recommends that legislation should be enacted to increase the terms of regulatory agency members to uniform terms of 10 years, together with an annual increment in salary and with strengthened provisions for pension rights." *Id.* at 6.

"V. The subcommittee recommends the enactment of legislation to increase the prestige and power of hearing examiners, and to adjust their compensation to a rate commensurate with such added stature of these officers." *Id.* at 7.

"VI. The subcommittee recommends that every assistance should be given in making permanent an Administrative Procedure Conference, and that Congress should provide the Office of Administration and Reorganization with funds to provide a permanent secretariat for that Conference." *Id.* at 9.

"VII. The subcommittee recommends against the present enactment of any general revision of the Administrative Procedure Act." *Id.* at 10.

"VIII. The subcommittee recommends the enactment of legislation to protect consumers from delays by which utilities have been able to amass capital by filing unjustified applications for rate increases." *Id.* at 11.

"IX. The subcommittee recommends the enactment of legislation which will minimize the difficulties of obtaining speedy and convenient judicial review of agency decisions." *Id.* at 12.

[173] *Id.* at 7-9.

[174] For himself, Senator Hart (the other majority member of the Subcommittee), and Senator Long of Missouri.

[175] See note 129 *supra* and related text. Discussion of the application of the initial-decision procedure to formal rulemaking is complicated by the difference between the definition of "rulemaking" in the proposed Code and the definition in the Administrative Procedure Act of 1946. See page 227 *supra*.

[176] See note 134 *supra* and related text.

the novelty or importance of the question involved makes final adjudication by the agency appropriate; and that approval was repeated in behalf of the American Bar Association in a hearing on S. 1734 held by the Subcommittee on May 18. The American Bar Association has not yet taken a position on the question whether the grounds for discretionary agency review should be specified by statute, as S. 1734 would do, or should be left to definition by agency rule under specific rulemaking power granted by statute.[177]

In my view the recommendation of the Subcommittee report against present enactment of any general revision of the Administrative Procedure Act[178] does not represent a final conclusion. When the report was written, there had been inadequate time for study of the report of the American Bar Association's Committee of Consultants[179] on our proposed Code, and the Code itself had not been the subject of detailed consideration at Subcommittee hearings.[180] The hearing of May 18 on S. 1734[181] gave opportunity for illustrating the advantages of general over piecemeal revision, and illustrated also the merits of some of the specific provisions of our proposed Code. My expectation is that with further detailed hearings of this kind and further study of the report of the Committee of Consultants, the Subcommittee will conclude that general revision in line with our proposed Code is desirable.

Finally, it appears to me that the provisions of our proposed Code with respect to judicial review[182] encompass all that the Subcommittee proposes in its recommendation on that subject.[183]

[177] The latter approach is taken by reorganization plans transmitted by the President to the Congress in April and May, which apply to much besides formal adjudication.

[178] S. Rep. No. 168, at 10-11.

[179] See notes 108 and 109 *supra* and related text.

[180] See note 111 *supra*.

[181] The transcript of this hearing has not yet been published.

[182] See pages 231-34 *supra*.

[183] S. Rep. No. 168, at 12.

CONGRESS AND ADMINISTRATIVE REGULATION

FERREL HEADY* AND ELEANOR TABOR LINENTHAL†

In the long history of the development of the process of administrative regulation in this country, the controversies that have taken place and the decisions that have been made have inevitably centered in the Congress of the United States. In our governmental system, the action of Congress has been required to put into effect programs of government regulation, to create the agencies of implementation through which these programs are to be achieved, to determine the balance of relationships between the government as regulator and the private regulatees, and in general to determine the characteristics of administrative regulation in our increasingly complex social and economic system. This is not to imply by any means that Congress has been the exclusive agent of authoritative choice in these matters. The courts have shaped the administrative process in a multitude of cases reflecting judicial views as to the permissible scope and method of regulatory action. The President is in a constitutional position to participate with Congress in the enactment of legislation and has frequently done so with decisive effect in this area. Moreover, and of even greater importance, the President, as chief of administration, can easily influence the development of regulatory administration, especially as it has become more closely identified with the executive branch of government. Spokesmen for organized groups outside government, particularly representing the legal profession and economic interests subject to regulation, have vigorously pressed their views upon the responsible governmental officials. At the center of this array of contending forces, however, is Congress. It may often play a passive rather than an initiating role, but its sanction must be secured. This is so because of its constitutional status and because of the impressive combination of legislating, appropriating, investigating, confirming, and related powers at its disposal.

Our purpose here is to describe the history of the efforts of Congress to cope with the problems of administrative regulation. If what has already been said is substantially correct, then it follows that the administrative process as it now functions is primarily the consequence of congressional action and reflects the cumulative judgment of Congress as to proper public policy in this area of governmental concern. In general and in the long run, Congress has been the sponsor and molder of our present system of administrative regulation, and has resisted strong urgings for its drastic reform or elimination. As Kenneth C. Davis has commented,[1]

* A.B. 1937, A.M. 1938, Ph.D. 1940, Washington University (St. Louis). Professor of Political Science and Director, Institute of Public Administration, University of Michigan. Research fellow in administrative law, Brookings Institution, 1940-41. Author, ADMINISTRATIVE PROCEDURE LEGISLATION IN THE STATES (1952). Contributor to professional periodicals.

† A.B. 1943, Radcliffe College; Ph.D. 1956, Cornell University. Research Associate, Institute of Public Administration, University of Michigan.

[1] 1 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 1.07 (1958).

[the] undeniable fact still remains that the community as a whole, expressing itself through repeated legislative action, federal, state, and local, steadfastly rejects conclusions that the growth of the administrative process should be resisted and opposed. Indeed, the long battle over the fundamental desirability of establishing administrative agencies and of continuing to rely upon their processes is rapidly diminishing and may be about ended.

Of course, this generalization does not imply uniformity and consistency in congressional treatment of problems of regulatory administration. Accompanying this long-range support given to the administrative process, Congress has shown a succession of concerns about the nature of regulatory agencies and their operating methods. In the following discussion, we have identified in chronological order four periods, each evidencing a different emphasis for congressional attention and action contemplated or taken. There are no distinct transitions from one phase to the next, and the correct characterization of shifts in congressional intent is certainly subject to dispute, but we believe that this account accurately reflects the important trends.

The first of these periods is the longest, but will receive the least attention here. It extends from the beginnings of what we now call the administrative process to the decade of the 1930's. During this time, the pattern of administrative regulation was established and its significance expanded tremendously. These developments came mainly in the twentieth century, although they began earlier. Kenneth C. Davis estimates that about one-third of federal peacetime agencies were created before 1900, and another third before 1930.[2]

The period produced the familiar combination of legislative, executive, and judicial type powers in regulatory agencies, particularly the so-called independent regulatory commissions. It brought the growth of administrative law, described by Arthur Vanderbilt as "the outstanding legal development of the twentieth century, reflecting in the law the hegemony of the executive arm of the government."[3] Despite the implications of this comment on the legislative-executive balance of power in our constitutional system, Congress made possible and in general facilitated the remarkable expansion of the administrative process that occurred.

In recent years, despite continued general support to the existing system for administrative regulation, Congress has shown a recurrent interest in re-examination and possible reform of the administrative process. In its first phase, during the decade of the 'thirties, this took the form of proposals for drastic alterations, culminating in the passage in 1940 of the Walter-Logan bill,[4] which failed to go into effect only because of a presidential veto. Following this event, and continuing until recently, has come a period of emphasis upon procedural uniformity with only minor adjustments in the basic machinery, exemplified by the Administrative Procedure Act of 1946 (APA),[5] which continues to be the landmark effort by Congress to improve

[2] *Id.* § 1.04.

[3] Vanderbilt, *Introduction* to BERNARD SCHWARTZ, FRENCH ADMINISTRATIVE LAW AND THE COMMON-LAW WORLD at xiii (1954).

[4] S. 915, H.R. 6324, 76th Cong., 1st Sess. (1939).

[5] 60 Stat. 237, 5 U.S.C. §§ 1001-11 (1958).

the administrative process. Now Congress seems to be entering a period of reexamination as to the finality of the current procedural code and of exploration of proposals, both old and new, for solutions to commonly recognized deficiencies in administrative regulation. The direction in which Congress will choose to go is still uncertain, but the more likely paths can be mapped out.

We will now examine more closely the role played by Congress in appraising the administrative process during each of these three chronological periods covering the last three decades.

I

THE CAMPAIGN TO RESHAPE THE ADMINISTRATIVE PROCESS

Despite the willingness of Congress to assist in the growth of the administrative process, there were always those in Congress who deplored what was taking place. In 1886, when the Interstate Commerce Act was under consideration, Representative Oates declared: "I believe it is absolutely unconstitutional and void, because to my mind it is a blending of the legislative, the judicial, and perhaps, the executive power of the Government in the same law."[6]

As the scope of the administrative process broadened and the importance of administrative regulation increased, such grave misgivings were repeated by those both in and out of Congress who opposed the combining of legislative and judicial functions, and who further decried that judicial self-denial that served to aid and abet this tendency. Louis Caldwell commented:[7]

> So far as I know, not a single federal decision declares or even hints that it is unconstitutional to combine judge with prosecutor or legislator, and there are many decisions which can be cited as giving tacit approval to that combination.

James M. Beck's *Our Wonderland of Bureaucracy,* was an extreme but widely publicized expression of aversion to the administrative process.

In Congress, one early indication of reappraisal was the introduction by Senator Norris, in January 1929, of a proposal for a court of administrative justice. In support of this bill,[8] the senator stated:[9]

> . . . It creates no innovations, but it does propose to reorganize and simplify the procedure of securing judicial review of administrative acts and decisions. The bill merely provides for the consolidation of certain special courts, the transfer to the consolidated court of the jurisdiction now exercised by those special courts and by the Supreme Court of the District of Columbia, the simplification of procedure, and recognition of the practice, in extraordinary proceedings against officers of the Government, of having them represented in whole or in part by their own subordinates who are especially skilled in the laws of controversy. . . .

[6] Quoted in 1 DAVIS, *op. cit. supra* note 1, § 1.09 n.10.
[7] Caldwell, *A Federal Administrative Court,* 84 U. PA. L. REV. 966, 975 (1936).
[8] S. 5154, 70th Cong., 2d Sess. (1929).
[9] 70 CONG. REC. 1032 (1929).

Senator Norris directed attention to the existence of a similar institution—a single court to hear and determine all claims and controversies with the government—in France and the various subdivisions of the German Republic, though he clearly indicated no desire for a breadth of jurisdiction in the American model comparable to that enjoyed abroad.[10] Nothing further came of the bill; Senator Norris had apparently expected and hoped for no more than discussion of its objectives in a general way, by members of Congress, by government officials, by attorneys generally, and by the people at large.

By 1932, notice was directed to the "growing quantity of delegated legislation" and "numerous offices, boards, and commissions authorized to make administrative orders, rules, and regulations."[11] By 1934, a committee report of the American Bar Association had been released that urged first, the creation of a federal administrative court, with an appellate division and accompanying branches and subdivisions; second, that judicial review of administrative acts should include appeal on facts as well as law; and third, that existing boards and commissions should be abolished.[12] A bill proposing a federal administrative court was again introduced in 1936, but had little impact. This bill, designed to achieve, *inter alia,* the consolidation of the Court of Claims, the Court of Customs and Patent Appeals, the Customs Court, and the Board of Tax Appeals—"an independent agency in the executive branch of the government"—did not have the sponsorship of the American Bar Association.[13] Yet, to many, this bill represented a major stride forward in the control of administrative adjudication.

Despite the emphasis in this period upon the merits and desirability of a federal administrative court, a new approach began to gather strength. For its proponents, the creation of an administrative court appeared to be a step "in derogation of the regular courts" and further, would not "reach and control the administrative process at its source." Further, by 1938, there were those who argued that[14]

> . . . any reform in the procedure for judicial review of administrative decisions should commence with the administrative processes themselves . . . that by such improvements the necessity for judicial review will be reduced to a minimum.

[10] *Ibid.*

[11] Haines, *Effect of the Growth of Administrative Law Upon Traditional Anglo-American Legal Theories and Practices,* 26 AM. POL. SCI. REV. 875, 876-77 (1932).

[12] This report is critically reviewed in Phillips, *An American View of Administrative Law,* 52 L.Q. REV. 25 (1936). The prevailing English position is distinguished on three grounds, in that the Committee on Ministers' Powers (1) "briefly and without hesitation" had advised against a regularized system of administrative courts; (2) had opposed "emphatically" appeals on issues of fact; and (3) "deliberately" had set out to establish administrative bodies with a maximum of freedom from political influence.

[13] See generally 60 A.B.A. REP. 136 (1936), for a discussion of the committee report.

[14] McGuire, *Current Administrative Law Proposals,* 3 FED. B.A.J. 239, 242 (1938). A 1937 report of the American Bar Association's Special Committee on Administrative Law had proposed control of administrative agencies via elaborate procedural safeguards and comprehensive judicial review of rules, orders, and decisions. The draft bill that resulted was altered in 1938 and again in 1939. The latter version became S. 915 (Walter-Logan) and represented abandonment of two previously prevailing approaches to control of the administrative process—namely, (1) consolidation of legislative courts into administrative courts; and (2) the abolition of many independent agencies.

The Walter-Logan bill, which was officially sponsored by the American Bar Association, marked the culmination of this phase of congressional activity. The terms of this proposal, and the debate that it generated, thrust into sharp focus the change in direction of congressional thinking on the matter of its role vis-à-vis administrative regulation. Via this measure, for the first time, Congress sought to meet the clamor for administrative reform by the device of prescriptions for uniform procedures. The implementing provisions, however, were not designed to strengthen the functions of administrative agencies. To the contrary, in the view of many serious critics of the proposal, who themselves recognized and urged the need for improvements in the administrative process, the Walter-Logan provisions represented a deliberate effort to hogtie administrative regulation. They viewed it as reflecting fear of "bureaucracy" and a threat to legislative authority; an unwillingness to accept the administrative process as a proper mode of action in American governmental life; and a predilection to identify the security of the canons of due process with traditional judicial process.[15]

The specific provisions of the Walter-Logan measure, which had as its immediate purpose the establishment of uniform procedural regulations for administrative agencies, dealt with the following matters: (1) issuance of rules and regulations; (2) administrative adjudication of controversies between the government and a citizen; and (3) judicial review of final orders and decisions of administrative agencies.

By the terms of the bill, administrative rules were to be issued only after publication of notice and public hearings. All rules and regulations that were in existence on the date of enactment were required to be reconsidered, after public notice and hearing, by the issuing agency, if such consideration was requested by any person substantially interested in the effects of the rule or regulation in question. Such requests were to be made within one year following enactment. Further, all rules and regulations were to be issued within one year of enactment of the authorizing statute, but could be amended and modified at a later date. Approved rules were to be published in the Federal Register, and any individual acting in good faith in accord with a published rule was to be protected for thirty days after publication notice in the Register of either a rescinding of the rule or a holding of invalidity. In addition, within thirty days of publication of a rule or regulation in the Register, any person substantially interested in the effects of a rule could petition the United States Court of Appeals for the District of Columbia to enter a declaratory judgment that would determine whether the rule was in conflict with the Constitution or with its authorizing statute, or whether it issued under the proper authority. This review by the Circuit Court was to be final.

"To prevent arbitrary and irresponsible action by administrative officers in the

[15] Landis, *Crucial Issues in Administrative Law*, 53 HARV. L. REV. 1077 (1940); Jaretzki, *The Administrative Law Bill: Unsound and Unworkable*, 2 LA. L. REV. 294 (1940); Remarks of F. Blachly, printed as part of the *Hearings Before Subcommittee No. 4 Senate Judiciary Committee on . . . and H.R. 6324*, 76th Cong., 1st Sess. 156 (1939).

administration of . . . statutes and the rules and regulations issued thereunder," the Walter-Logan bill provided that a person aggrieved by an administrative decision could, within twenty days, address a written petition to the agency head, state therein the nature of his objection, and, at the same time, request a hearing. The head of the agency was to designate an intra-agency hearing board of three, one of whom was to be a lawyer. The number of boards was to vary with the need for them; such boards were to meet at various places throughout the country. The individual aggrieved was to be allowed to call his own witnesses; he could cross-examine government witnesses and compel production of documents. Further, the complainant did not have to petition the agency to issue a subpoena; by the language of the act, he had the right to request such action by the agency. A copy of the proceeding was to be given to the complainant, and within thirty days, the intra-agency board was to file written findings of fact and a written decision. The authority to approve, disapprove, or modify rested with the agency head. Where independent agencies were involved (defined as those with two or more officers at the head), the act specified that such agencies could, by rule, provide for an initial hearing by the trial examiner. Following the submission of his written findings of fact and decision with the agency and the complainant, the agency would hold a hearing only if the complainant filed written objections. Where agencies had three chief officers, the hearing could be held by these three; where there were fewer than three, the intra-agency board technique was to be utilized.

Those who supported the Walter-Logan legislation held a strong conviction of the need to establish not only uniform procedures of judicial review for all administrative orders and decisions, but uniform rules as well that would define the scope of judicial review. Accordingly, by the terms of the legislation proposed, within thirty days after notice of a final agency order or decision, any party to a proceeding could file a written petition for review with the circuit court of appeals where he resided, where he had his principal place of business, where the controversy arose, or, with the Court of Claims, if the cause of action was within that court's jurisdiction. The court could affirm or nullify the agency decision or order, remand the matter for further evidence, or direct the agency to modify its decision. Several grounds for reversal were prescribed. Decisions were to be final, except for the allowance of review by the Supreme Court on certiorari or certification. And, "as a final rule of uniformity," it was specified that a court that found itself in disagreement with a previously rendered opinion of another court was to certify the matter to the Supreme Court.

Justifying grounds for legislation along the lines of the Walter-Logan bill, as viewed by its supporters, may be summarized as follows. First, unlike actions at law and equity, the administrative process had no uniform procedure for hearings and no uniform method or determined scope of judicial review. Second, given such a lack of uniformity, administrative agencies were not disposed to heed decisions of either other administrative agencies or the courts, nor were they helped much if

they did. Third, where statutes had not been devised as guidelines for improvements in the administrative process, the consequences were *ad hoc* procedures in the agencies, with accompanying unnecessary fumbling and undeserved criticism of courts that sought to define rules for trial or appellate proceedings. There were those who saw in the Walter-Logan measure a means of reversing

> the drift into parliamentarism which . . . could but result in totalitarianism with complete destruction of the division of governmental power . . . and with the entire subordination of both the legislative and judicial branches of the Federal Government to the executive branch wherein are included the administrative agencies and tribunals of that Government.

There were others for whom the measure spelled a rejuvenation of congressional authority, the security of a government of laws, and freedom from administrative, and more specifically departmental, absolutism.[16]

Adverse reactions to the legislation were prompt and vigorous, and criticism was directed to virtually all sections of the bill. Prominent individuals in the legal profession and several significant segments of the bar withheld support of the bill,[17] although the American Bar Association itself officially endorsed the Walter-Logan measure. Passed by Congress in 1940, the bill was vetoed by President Roosevelt in December of that year. In his veto message, the President indicated his desire to wait for the report and recommendations of the recently created Attorney-General's Committee on Administrative Procedure "before approving any measure in this complex field." The message reflected, however, the view of those who had sharply criticized the proposed legislation, for it stated:[18]

> . . . . The very heart of modern reform administration is the administrative tribunal. Great interests, therefore, which desire to escape regulation rightly see that if they can strike at the heart of modern reform by sterilizing the administrative tribunal which administers them they will have effectively destroyed the reform itself.

That the presidential veto was sustained by Congress is not surprising, however, notwithstanding the originally substantially favorable vote and the impassioned pleas in behalf of the bill. There was also in Congress, at this time, a well-articulated awareness of the dangers inherent in the Walter-Logan bill, for as Kenneth C. Davis has pointed out,[19]

> Its proponents seemed fully aware of its devastating character, for they exempted from its provisions the agencies whose work they were anxious to protect.

[16] 84 CONG. REC. 9392 (1939).

[17] Strongly opposed were the Committees on Administrative Law and on Federal Legislation of the Association of the Bar of the City of New York, and Louis Caldwell who said, "With minor exceptions, it is difficult to know just what agencies and what quasi-judicial functions are reached by this bill that are not already equipped with at least equal and usually superior machinery." 86 CONG. REC. App. 2223 (1940).

[18] *Id.* at 13942-43, and reprinted in Message from the President of the United States, *Providing for the Expeditious Settlement of Disputes with the United States*, H.R. Doc. No. 986, 76th Cong., 3d Sess. (1940).

[19] 1 DAVIS, *op. cit. supra* note 1, § 1.04.

The Walter-Logan bill marks the extreme in efforts by Congress to accomplish a drastic overhaul of the machinery for administrative regulation. As described by one commentator:[20]

> The bill contained gross infirmities. It prescribed a single, impossibly rigid procedure for rule-making and subjected almost every administrative action to judicial review, on questions of law and fact, and for almost any conceivable reason. It proposed a sterilization of the administrative process.

James M. Landis asserted that it would "cut off here a foot and there a head, leaving broken and bleeding the processes of administrative law."[21] What the actual consequences would have been we cannot know, because the Walter-Logan bill never became law. The presidential veto thwarted what was, at the moment at least, the recorded majority will of Congress.[22]

II

REFORM THROUGH A GENERAL CODE OF PROCEDURE

In the years that followed the defeat of the Walter-Logan measure, several developments transpired: the report of the Attorney-General's Committee was published, and legislative measures proposed by both a majority and minority of that committee were recommended; the American Bar Association drafted and adopted a declaration of principles that, in its view, would provide a proper conceptual framework of subsequent administrative procedure legislation; a subcommittee of the Senate Judiciary Committee held hearings on the Attorney-General's report; in August 1943, the House of Delegates of the American Bar Association authorized its administrative law committee to draft legislation that would further the objective of fair administrative practice and, following Association approval, to work for the enactment of such legislation; and in June 1944, bills were introduced, followed by revisions in 1945, that provided the principal essentials of the APA.

Throughout this period, congressional concern with the administrative process, as well as external pressures upon Congress for its reform, continued to be vigorous—and, in one respect, consistent. Conceptually, the problem remained one of conflict between two types of governmental action, administrative and judicial.[23] Writing in 1940, Walter Gellhorn could speak of agreement in the legal profession that "judicial review of administrative decisions is a poor substitute for good admin-

[20] RINEHART J. SWENSON, FEDERAL ADMINISTRATIVE LAW 121 (1952).

[21] Landis, *supra* note 15, at 1102.

[22] What Congress failed to focus on in this bill is in many ways more revealing of its perceptions than what it actually tried to enact. Specifically: (1) the Government would not stand on an equal footing with a corporation or individual when a rule was contested; (2) no distinctions were drawn between substantive, interpretive, and procedural rules; (3) informal administrative proceedings were ignored; (4) the problem of the combination of the prosecutor-judge function was scarcely touched; (5) the qualifications and tenure of the hearing officers were not dealt with; and (6) recognition of the diversity of functions within agencies was lacking.

[23] See generally MacMahon, *The Ordeal of Administrative Law*, 25 IOWA L. REV. 425 (1940).

istrative decisions in the first place."[24] He could not, either as an observer of the administrative scene or of its critics, record much in the way of unity where discussion arose as to the most desirable means of achieving good administrative decisions. In this period of the early 'forties, the legislative antecedents of the APA were numerous and their provisions reflected a jockeying between conceptions—that which characterized the Walter-Logan legislation and that which ultimately characterized the APA.

The provisions of that Act may be broadly summarized; the congressional mood that its acceptance reflected may be variously interpreted. The significance of the Act may similarly be variously regarded. But whatever the construction put upon legislative motive and administrative impact, the following points stand out in any consideration of the APA. First, whatever its deficiencies, in its drafting or operation, the Act reflected acceptance of the administrative process to the point where legislative authority would be utilized to improve that process, not to restrict it to the point of crippling. Second, the language of the statute reflected awareness of the functional diversities implicit in regulation. Third, it has had the consequence of allowing Congress and the agencies a measure of flexibility for dealing with those niceties of procedure and substance that are not readily discernible in the elemental stages of any emergent governmental process. Congressional efforts, via the APA, to cope with the impact of the administrative process upon the traditional canons of due process, as they relate to personal and property rights, may well have the ultimate result of an ever-increasing congressional involvement in administrative operations.

The courts have, over a wide range of specifics, construed the "intent" of Congress in enacting the APA, but the congressional mood is perhaps best described by focusing on the areas in which Congress acted: publicity of administrative material (rules, orders, regulations, procedures); systematization in administrative operations (rule-making, adjudication, hearing procedures, role of the trial examiner); and provision for judicial review, a "remedy for every legal wrong."

In the words of one observer, the APA represented an effort to answer the questions,[25]

> how to assure public information, how to provide rule-making where no formal hearing is provided, how to assure fairness in adjudications, how to limit sanctions, how to state all the essentials of a right to judicial review, and how to make examiners independent.

For Senator McCarran, the APA was a "bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated . . . by agencies of the Federal Government."[26] The legislative history of the Act reveals a view of the need for such legislation that was grounded on three principal points: (1) that the subject of

[24] Gellhorn, *Introductory Remarks to Symposium on Procedural Administrative Law*, *id.* at 421, 423. For a "capsule" view of the changing problems in administrative life, *compare* MacMahon, *supra* note 23, *with* Kintner, *The Current Ordeal of the Administrative Process*, 69 YALE L.J. 965 (1960).

[25] Senate Comm. on the Judiciary, *Administrative Procedure Act, Legislative History*, S. Doc. No. 248, 79th Cong., 2d Sess. 295 (1946).

[26] *Id.* at 298.

administrative law and procedure was not mentioned in the Constitution; (2) that there was no extant recognizable body of administrative law for administrative agencies as there were substantive and procedural guidelines for courts; and (3) that there were further no clearly recognizable legal guides for the public or administrators in the implementing of administrative process. The APA, therefore, was designed to achieve the following: issuance, by agencies, as rules, of certain specified information as to administrative organization and procedure; statement of the essentials of the several forms of administrative proceedings and general limitations on administrative powers; provision in more detail of the requirements for administrative hearings and decisions in cases in which statutes require such hearings; and a simplified statement of judicial review of administrative acts. By the terms of the Act, administrative rule-making and administrative adjudication were distinguished. Rule-making procedures were characterized by flexibility and informality, whereas procedure in adjudication was more formalized and followed judicial procedure more closely. Aside from requirements concerning publicity and the effective date of rules, the legislation merely afforded interested persons the opportunity to submit written data, views, or arguments and required the agency to consider relevant matters submitted. Oral presentation at a hearing was optional with the rule-making agency, although the APA did make provision, in special circumstances, for a more formal rule-making procedure patterned after adjudicative procedure. With respect to administrative adjudication, the key provisions in the APA established a semi-independent corps of hearing examiners who would preside in cases not heard by agency heads and who could issue initial or recommended decisions.

The language of the APA broadened the base for judicial review of administrative actions and reflected adherence, on the one hand, to the generally accepted substantial evidence rule, but rejection, on the other, of limitations upon the reviewing court that would permit review of one side of the evidence only.

Four years after enactment of the APA, Mr. Justice Jackson said that it "represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest."[27] That the APA was a landmark in the strife surrounding the administrative process is certain. But today, in 1961, it is hard to discern exactly what contentions were settled, harder to set forth the precise formula presumed to have brought peace to the contending forces, and still harder to justify the claim that opposing forces have, indeed, come to rest.

III

EMERGING TRENDS AND DEVELOPMENTS

In recent years, Congress has again become the arena in which consideration is being given to issues of administrative regulation, both old and new. The interim

[27] Wong Yang Sung v. McGrath, 339 U.S. 33, 40 (1950).

nature of the settlement of the 1940's, as represented by the APA, has become more and more apparent, but it is too early to discern clearly what patterns of revision will emerge during the decade of the 1960's.

The many and serious problems confronting the administrative process currently have led many of its critics to charge that administrative agencies are not "doing their job."[28] Earlier attacks on the administrative process turned on constitutional questions.[29] Subsequent criticism hammered away at the need for procedural requirements to conform more closely to judicial procedures.[30] The "not doing the job" critics, however, may well represent one of the most formidable sources of opposition, for the implication of their argument is that administrative agencies cannot do the job, absent certain restrictive changes. It may be argued that it is not for lack of ability that some agencies do not function effectively, but for (1) a want of congressional concern with a wide gamut of policy questions that affect day-to-day administrative processes, and (2) a continued lack of clarity in legislative-administrative relationships.

In the tangled web of these relationships, certain points stand out: the element of political support so necessary for administrative programs; legislative devices for control of administration that are not always clearly apparent;[31] legislative control devices that are all too apparent and that provide a vehicle for congressional crippling of administrative efforts;[32] the practical need of the legislature to rely on agencies or regulatory commissions; the positive, beneficial aspects of congressional interest in administrative matters;[33] the compromise nature of those legislative mandates

[28] MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION (1955); Hector, *Problems of the CAB and the Independent Regulatory Commissions*, 69 YALE L.J. 931 (1960) [this report has been published as a committee print by the Senate Committee on Government Organization, 86th Cong., 2d Sess. (1960), and is hereinafter cited as HECTOR MEMORANDUM].

[29] For a detailed discussion, see Cushman, *The Constitutional Status of the Independent Regulatory Commissions*, 24 CORNELL L.Q. 13, 163 (1935).

[30] *Hearings Before a Subcommittee of the Senate Committee on the Judiciary on S. 674, S. 675, and S. 918*, 77th Cong., 1st Sess. (1941). See also McFarland, Stason, Vanderbilt Report, in Senate Comm. on Administrative Procedure, *Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess. 203 (1941).

[31] Statutory provisions, where they define agency relationships, "run a gamut, permitting the exchange of information, providing formally prescribed sources of advice, compelling agencies to consult, to consult and consider, to consult prior to taking specific action, hinging action to the receipt of a prior enabling report or request, requiring prior consultation and fact finding, requiring clearance or approval from a source external to the agency, and finally, compelling action in conformance with the request of another agency." See generally Cotter & Smith, *Administrative Responsibility: Congressional Prescription of Interagency Relationships*, 10 W. POL. Q. 765, 782 (1957) [reprinted as Stanford University Political Sciences Series No. 62].

[32] Among the more obvious devices: (1) undue number of watchdog committees; (2) improper congressional pressures on matters pending before agencies; (3) appointment of high-level administrative personnel to satisfy political and interest pressures, rather than reliance on merit and suitability; and (4) detailed committee hearings, on proposed contracts, which have a "pressure effect," despite the inadequacy of a congressional committee to validate or invalidate a contract. Two excellent discussions in point are Ginnane, *The Control of Federal Administration by Congressional Resolution and Committees*, 66 HARV. L. REV. 569 (1952); Morrisson, *Federal Support of Domestic Atomic Power Development*, 12 VAND. L. REV. 195 (1958).

[33] The congressional tradition of reference has led on occasion to serious problems of ethics. However, positive aspects of the tradition are pointed up by testimony in *Hearings Before the Subcommittee of the House Committee on Interstate and Foreign Commerce on Administrative Process and Ethical Ques-*

that the administrative process must implement; and the need of the administration to convert "the controversial into the routine." Yet, considerations such as these, which describe crucial relationship points of legislative-administrative life, are deeply involved with certain, if not most, of the major problems that confront the administrative process. Congress has shown no great haste in the direction of new administrative procedure legislation, although considerable legislation has been proposed. But Congress is, by hearings and agency surveys, addressing itself to specific thorny spots in administrative life.

Friends of the administrative process must also be its strongest critics. The staunchest supporters of that process can scarcely fail to perceive that there are prominent problems in administrative life: there is, unquestionably, in many instances, a level of expense and delay in administrative proceedings that defeats an essential purpose of administrative process; there are serious questions that can be raised with respect to "expertise" in administration, particularly at the decision-making level; comment has ranged far and wide as to the responsibility of agency heads to write decision-making opinions; considerable attention has been directed to the problem of voluminous records that emerge from administrative proceedings upon which decisions and appeals must be based, as well as the tangential and derivative problem of *ex parte* communications; the question of the desirability of general fact pleading has, in terms of quick and precise illumination of issues, come to the fore; the entire area of informal procedures, described by the Attorney-General's Committee as early as 1941, as "the life blood of the administrative process," requires continuing appraisal; and the need is increasingly apparent for reliable information on the present and potential operating capacity of an agency and the staffing and management problems that are involved as a consequence.[84]

In terms of specifics, these are but a few of the knotty questions with which Congress must come to grips. But the shortcomings of administrative life go beyond such specifics. Above and beyond procedural questions is the need to rethink the role of regulatory commissions and agencies, their position in the structure of government, and the degree to which responsibility and authority are meshed. Although his remarks were directed principally to regulatory commissions, the recent statements of the Deputy Director of the Bureau of the Budget before a congressional subcommittee are of interest generally, for he said:[85]

> Policy decisions of far-reaching importance are committed to the heads of regulatory agencies. The Bureau of the Budget suggests that the Senate consider whether they should not have the authority and the discretion to adopt the organization and procedure

tions, 85th Cong., 2d Sess. (1958). James Landis noted, for example, that during his tenure as CAB Chairman, proper decisions relevant to air feeder service were facilitated by congressional interest. *Id.* at 111. See also Newman & Keaton, *Congress and the Faithful Execution of Laws—Should Legislators Supervise Administrators?*, 41 CALIF. L. REV. 565 (1953).

[84] *Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary on S. Res. 234*, 86th Cong., 2d Sess. 37-38 (1960). An informative account is given of the results of two or more management firm surveys, 1953-60, of problem areas of regulatory agencies.

[85] *Hearings*, *supra* note 34, at 53.

which would assure fair and equitable administration, and also would be suited to their respective activities and the industries with which they deal. . . .

In the early years of regulation, the legislative mandate indicated with some clarity the economic or social program visualized. Today, in too many instances, the legislative mandate is not clear, is outdated, or is not revealed. Further, there is, as James M. Landis suggests, a need for creative thinking by administrative groups. But the benefits of the most uniquely creative approach are likely to be minor if Congress, given the practical realities of technological and economic complexity, fails to recognize that procedure is the instrument of administrative fair play, in the larger social and constitutional sense, only when it does not shape substantive action away from the objectives for which the administrative agency exists. Today, in the area of administrative regulation, Congress must address itself to two primary matters: (1) the determination of those principal problems that do, in fact, hinder administrative effectiveness and the fair disposition of administrative justice; and (2) the need to assess the range of its own role in administrative life, or, put differently, the question of whether the quest for control of governmental administration can be met "by arduous feats of legislation."

It remains yet to be seen whether Congress will see fit to tackle some of the current problems of administrative life by (1) piecemeal changes in existing requirements as to procedure; (2) legislation that would focus on changes in the structural organization of the administrative process; (3) an emphasis on the possibilities of agency self-improvement; (4) a new uniform code; or, (5) resort to increased congressional oversight.

As used here, the term "piecemeal changes" includes either of two possible courses of legislative action: formal amendment of the APA, or statutory additions to other legislation that regulates the administrative process. Congress might choose to meet certain immediate and pressing problems in this fashion. For example, the House Legislative Oversight Subcommittee has proposed that those in the regulatory agencies who make the decisions shall be required to write the opinions themselves or direct the writing of them personally.[36] The notion of "anonymous opinion-writing" has been strongly criticized in some quarters on the grounds that "it creates a blank facade, behind which the individual commissioners become mere shadowy figures on the bench."[37] Further, it is argued, if commissioners lack the technical know-how and rationalization know-how of the opinion-writers, and if the opinions and decisions suffer thereby, a benefit will, nonetheless, result—namely, the bringing of "appellate review into closer conformance with the judicial theory on which it rests."[38] Third, the practice of group opinion-writing is held to be contrary to the view expressed in 1941 by the Attorney General's Report on Admin-

[36] Special Subcomm. on Legislative Oversight of the House Committee on Interstate and Foreign Commerce, *Independent Regulatory Commissions*, H.R. REP. No. 2711, 85th Cong., 2d Sess. 14, 41 (1959) [hereinafter cited as H.R. REP. No. 2711.]

[37] Hector, *Government by Anonymity*, 45 A.B.A.J. 1260, 1264 (1959).

[38] *Ibid.*

istrative Procedure that "the heads of the agency should do personally what the heads purport to do."[39] Built into the criticism of the group opinion-writing process is the notion that review of the record by those who are entrusted with the decision-making authority is somehow inadequate. But, as Kenneth C. Davis states:[40]

> Despite its immediately appealing quality, the broad ideal that agency heads should do personally what they purport to do is for many functions impractical and unworkable. . . . Increased subdelegation is clearly indicated. Decisions by panels of or divisions of agencies may help. But a rigid enforcement in all circumstances of a requirement that agency heads must read all records in all cases is not the answer, however appealing that idea might be in the abstract.

The problem of review by administrative officers and the related question of subdelegation are beyond the scope of this paper, but both questions are patently tangential to the matter of personalized opinion-writing, for there are those who believe that[41]

> . . . if the members of an agency do, in fact, decide the cases that come before them, and if in order to decide these cases they go through all the requisite mental processes, then there should be little extra burden in setting these mental processes down in an opinion. But if, as a matter of fact, they do not go through the requisite mental processes, then their decisions are in reality not supported by the necessary legal and factual foundations and are not rendered in accordance with law.

Agency criticism of any legislative proposal like that of the Harris subcommittee turns on points of efficiency, the more likely achievement of a "blending of views" where the opinion is not personalized, and consistency in agency opinions—a feature viewed as threatened by prescription for mandatory personalized opinions.[42] Nonetheless, the possibility of congressional action in this direction must be reckoned with, given strong pressures to "bring together the decision-making process and the facts in the case."[43]

Conceivably, Congress may choose to focus on problems pertaining to hearing examiners via "piecemeal" legislation. This officer, described as the "alter ego" of the agency he serves, was, prior to 1941, totally subject to agency controls. From 1941, when the Attorney General's Report was issued, to 1946, when the APA was enacted, the hearing officer's role reflected a curious blend of dependence and in-

[39] Attorney General's Comm. on Administrative Procedure, *Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess. 52 (1941).

[40] 2 DAVIS, *op. cit. supra* note 1, § 11.07.

[41] Hector, *Government by Anonymity*, 45 A.B.A.J. 1260, 1332 (1959).

[42] Civil Aeronautics Board, Analysis and Evaluation of the Hector Memorandum to the President, March 29, 1960 [noted in WALTER GELLHORN & CLARK BYSE, ADMINISTRATIVE LAW 1115 (4th ed. 1960)]; Kintner, *supra* note 24.

[43] The disadvantages inherent in the separation of opinion-writing from the decision-making process were pointed out as early as 1938 by James Landis. But, as Kenneth C. Davis currently states, "The objection to the separation of deciding from opinion writing may be unanswerable except in terms of inevitability. No one has yet conceived a system which will dispose of the quantity of adjudication, without an undue diversity of results, and will at the same time permit the deciding officers to write their own opinions." 2 DAVIS, *op. cit. supra* note 1, § 11.11.

dependence with respect to his functions and his relationship with the agency. There are many who hold that the dimensions of this office could have developed along substantially different lines,[44] but Congress in the APA clearly followed the "push" of the Attorney-General's Report. In enacting the APA, Congress plainly did not promote the hearing examiner to a position that would deny an agency effective power or grant him authority comparable to that of a trial judge. Via the APA, Congress strengthened the role of the examiner with respect to both the conduct of hearings and the filing of initial or recommended decisions. Yet, by legislative provision and judicial construction,[45] the status of the hearing officer has been pegged at a subordinate, if increasingly prestigeful, level. There are those who, in surveying the role of the hearing examiner, (1) plead the need for greater assistance to him—legal, clerical, statistical, analytical—given the voluminous records he reviews; (2) urge that greater weight be accorded his decisions; and (3) argue for the elimination of interlocutory appeals from proceedings, barring the examiner's permission. The status generally of the hearing examiner (including salary, rank, promotion) poses prominent questions.[46] But, despite a growth in prestige of the examiner, and despite increased recognition of his scope of effort, it is evident that agencies continue to regard the examiner as their alter ego; second, that they persist in the view that adjudicatory matters before a commission are not routine factual determinations, but problems of policy determination for which the agency is responsible; and third, that agencies are opposed to any effort to place examiners in a position of independence vis-à-vis the agency whose cases they hear.[47] In Judge Friendly's view,[48]

> . . . the same considerations that oppose a separation of adjudication and policy show the limits on deference to decisions by hearing examiners . . . . In those few cases in which the agency is simply applying a definite rule to the facts, the decision of the hearing examiner should be conclusive unless the commission grants review, and it should exercise great abstinence in doing that. In the cases in which fact finding and policy determination are mingled, deference should be paid to the examiner's findings on the facts; and it would be well if examiners were encouraged to devote more effort to this part of their work . . . rather than to spend time and thought, at least in the great cases, in preparing arguments and conclusions to which the commissioners surely will not and perhaps ought not give much weight.

[44] Kenneth C. Davis notes the following as major developmental stages in the role of the examiner, prior to enactment of the APA: (1) initially, under the enabling acts of the early regulatory agencies, the totally subordinate position of the hearing examiner; (2) "the ICC experience of finding some degree of one-man responsibility desirable for some proceedings and group responsibility desirable for others" as a basis for developing the examiner role; and (3) the impulse, generated by the Attorney General's Committee on Administrative Procedure, towards an increase in power and status which "has been strongly felt ever since." 2 DAVIS, *op. cit. supra* note 1, § 10.01.

[45] Ramspeck v. Federal Trial Examiners' Conference, 345 U.S. 128 (1953).

[46] PRESIDENT'S CONFERENCE ON ADMINISTRATIVE PROCEDURE, REPORT 62 *et seq.* (1955); *Hearings, supra,* note 30; Fuchs, *The Hearing Officer Problem—Symptom and Symbol,* 40 CORNELL L. Q. 281 (1955).

[47] See generally STAFF OF SENATE COMM. ON THE JUDICIARY, 85TH CONG., 2D SESS., SUMMARY AND COMPILATION OF DEPARTMENTAL AND AGENCY REPORTS ON S. 932 (Comm. Print 1958).

[48] Friendly, *A Look at the Federal Administrative Agencies,* 60 COLUM. L. REV. 429, 443-44 (1960).

Whether Congress will move within the confines of principle that holds as desirable a "semi-independent" role for the hearing examiner, if it does seek to improve the status of the hearing examiner, remains to be seen. But any congressional action should reflect the admonition of one distinguished observer of the administrative process:[49]

> What should be the status of the examiner? The answer must obviously depend upon what his functions should be. . . . To begin with the idea of life tenure and high salary and to build around that idea would be to begin at the wrong end. The starting point must be to discover what functions examiners do and should perform. The status must depend upon the functions. . . .

Of late, Congress has concerned itself increasingly with the problem of ethical standards in the federal government. It has addressed itself, as well, to the question of how such standards, once described, are to be enforced. Any one likely course of congressional action is impossible to predict, for the "problems of ethics" differ in kind; and legislative action, if desirable at all, must reflect this difference. Individual conduct, reflective of a wide range of group-interests, gives rise to a considerable portion of the criticism that clamors for more precise standards of official behavior. But, as one congressional subcommittee noted, much criticism of official behavior[50]

> . . . has to do with situations or institutional arrangements which aggravate pressures or make it more difficult for a public servant to act independently, *i.e.*, to judge issues on their merits.

The entire issue of consultation is very much in point here. The question—should deciding officers, at initial or final stages of decision, be allowed to consult staff members who have not been investigators or prosecutors in the case—involves, *inter alia*, the "use of ideas or advice from extra record sources."[51] The congressional stand on this question has varied significantly:[52]

> The Taft-Hartley Act seems to express congressional dislike for consultation except between the examiner and members of the Board. The 1952 amendments to the Communications Act are far more restrictive than any other legislation. . . . The Immigration Act of 1952 moves in the opposite direction, removing all restrictions on consultation by deciding officers, even to the extent of legalizing consultation of investigators and prosecutors.
>
> The most important congressional position is that taken in the APA, which leaves agency heads free to consult any staff members except investigators or prosecutors, but which forbids examiners to consult off the record any person or party on any fact in issue.

Remedies proposed in the last ten years, with respect to external pressures upon individual official conduct, fall into the following categories: (1) the enactment of a

[49] 2 DAVIS, *op. cit. supra* note 1, § 10.01.

[50] STAFF OF SUBCOMM. OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 82D CONG., 1ST SESS., ETHICAL STANDARDS IN GOVERNMENT 19 (Comm. Print 1951). *Cf.* H.R. REP. NO. 2711; *Hearings, supra* note 33.

[51] 2 DAVIS, *op. cit. supra* note 1, §§ 11.08-11.18, 11.21.

[52] *Id.* § 11.21.

formal code of ethics that would govern the conduct of commissioners, commission employees, practitioners, and others who appear before the commissions;[53] (2) legislation that would require mandatory disclosure of income, assets, and transactions in securities and commodities; (3) amendments to the APA that would deal with a variety of defined improper practices (*e.g.*, appearances of former federal officials and employees before agencies in which they were formerly employed in cases which they previously handled or of which they had some direct knowledge, and acceptance of valuable gifts or services directly or indirectly from any person or organization with which the official or employee transacts business for the government); (4) changes in the criminal law relating to bribery, conflicts of interest, and *ex parte* communications in quasi-judicial cases;[54] (5) the establishment of a Commission on Ethics in Government that would investigate ethical standards in government in the interest primarily of "moral dynamics" rather than "abstract standards"; (6) the establishment of a Committee on Ethical Standards, if a code of ethics is enacted, to (a) adjudge violations, (b) render advisory opinions concerning ethical questions submitted to it, (c) promulgate interpretive rulings, and (d) recommend amendments and additions to the code; and (7) steps to upgrade the caliber of appointees to administrative positions.[55]

Those who argue in favor of a code of ethics are confronted by several significant counterarguments. First, personal integrity and courage of governmental personnel are the well-springs of ethical behavior as officials. Even in the presence of undue pressures and influence peddling, it still, as the saying goes, "takes two to tango." Second, there is merit to the view that one can rarely create morality by pronouncement. Third, enactment of a general code would not release individual agencies from the need to identify and deal with their own unique ethical problems. If Congress should choose to move in the direction of "ethics by statute"—and, given recent events, it may choose to do so—it will still have to come to grips with three

[53] See generally *Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary on S. Res. 61*, 86th Cong., 1st Sess. (1959); *Hearings, supra* note 34. See also Huard, *Influence in Federal Agency Law Making and Adjudicatory Proceedings—Should We Adopt a Code of Agency Ethics?*, 11 AD. L. BULL. 22 (1958).

[54] In Senator Douglas's view, the distinction, drawn by S. 2374, between adjudicating and rule-making procedures should not stand for purposes of defining standards of propriety of *ex parte* communications. He argues that there are adversaries in rule-making proceedings, just as in adjudication, and that "fairness" does not turn on the label of "rule making" or "adjudication."

[55] Proposals designed to improve the caliber of administrative personnel fall into two categories, the pious and the practical. The former stresses the need for the President to appoint eminently able men and for the Senate to evaluate them in terms of merit, not politics. The practical suggestions contemplate lengthier tenure for commissioners, legislation dealing with the practice of appointments for unexpired terms of agency members, studies in salary policy, vigorous staff recruitment of high-caliber legal personnel, and encouragement of career staff people to work toward appointment as an agency member. The proposal most recently suggested recommends legislation to increase the terms of regulatory agency members to uniform terms of ten years, together with an annual increment in salary and improved retirement benefits. See Senate Comm. on the Judiciary, *Administrative Practice and Procedure*, S. REP. No. 168, 87th Cong., 1st Sess. (1961) [hereinafter cited as S. REP. No. 168]. See also Kintner, *Federal Administrative Law in the Decade of the Sixties*, 47 A.B.A.J. 269, 272-73 (1961); *Hearings Before a Subcommittee of the House Committee on Interstate and Foreign Commerce on Major Administrative Process Problems*, 86th Cong., 1st Sess. (1959).

major needs: (1) Congress, in approving administrative appointments, must follow carefully drawn standards, not politics; (2) certain major policy areas require either a statement, clarification, or redefinition of congressional intent; and (3) it must not, in an effort to cope with improper pressures, "surround the Government service with so many snares, snags, and spring-guns that only the unwary can be recruited."[56]

Turning to another possible congressional approach—namely, legislation that would affect the administrative structure—we note the suggestion made by Mr. Hector in his now famous and much-answered memorandum.[57] In his view, congressional regulation would be more specific and executive responsibility enhanced if (1) policy functions of agencies were transferred to the executive branch; (2) the adjudicating function was placed in an administrative court; and (3) policy-making and planning became the responsibility of a single agency head.

In essence, this approach follows the course of action proposed by the President's Committee on Administrative Management.[58] Congress, however, has been reluctant, except in isolated instances, to support these views.

Proposals to establish a Federal Office of Administrative Practice, comparable to the suggestion of the Attorney General's Committee in 1941, have also drawn congressional interest. The creation of a continuing, independent body in the executive branch of the government that could study problem areas in administrative life and report on its findings to the President and the Congress is regarded in many quarters as an eminently desirable step. Testimony before the Carroll subcommittee, however, raised significant discussion as to the scope of authority to be accorded such an office and, more specifically, its director. There is, apparently, considerable agency concern that with respect to problems of administrative procedure, anything more than an advisory role for a director would lead to difficulties, given existing statutory requirements.[59]

If Congress follows a course in response to the recommendations of the Landis report,[60] it will, by basic structural changes, reach towards the achievement of what James Landis terms "a prime and immediate need"—to develop and coordinate policy immediately at a high staff level. Such a course might require congressional support of the President that would allow the latter to propose reorganization plans; congressional support of reorganization plans that would clarify the scope of authority of the chairmen of certain major regulatory agencies; congressional support of reorganization plans that would strengthen the position of the President vis-à-vis the FPC and the ICC; and congressional support, by statute, of the organization of a

[56] H.R. REP. No. 2711, at 88.

[57] HECTOR MEMORANDUM.

[58] PRESIDENT'S COMM. ON ADMINISTRATIVE MANAGEMENT, REPORT WITH SPECIAL STUDIES (1937).

[59] STAFF OF SENATE COMM. ON THE JUDICIARY, *op. cit. supra* note 47; see also Remarks of Walter Gellhorn in *Hearings, supra* note 34.

[60] JAMES M. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT (1960) [this report has been published as a committee print by the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 86th Cong., 2d Sess. (1960)].

secretariat to assume the duties performed by the Office of Administrative Procedure, which currently is located in the Department of Justice.[61]

Congress may choose to direct its attention to a re-evaluation of its intent in certain policy areas (*e.g.*, transportation and the notion of constructive coordination) and a definition or description, however broadly drawn, of some statutory policy in others (*e.g.*, communications). In the latter instance, the ever-vague concept of the public interest has controlled over the years, not the terms of a statutory mandate. Efforts in this direction—namely, changes in basic legislation, might help diminish the area of the controversial in which the administrator must function. Given any success in this direction, an important step may have been taken to meet what many view as a basic problem of regulation—the division of responsibility for management:[62]

> If the regulator is given a clear mandate to remove a perceived evil, he has an adequate and limited basis for validating his interference with management, and management has a basis for calculating the effects of the interference. But in the absence of a clear mandate, it is not only inevitable, but appropriate, that regulation take the form of an accommodation in which industry is the senior partner. . . .
> There is very little in our history . . . to indicate that an executive agency will be much different from an independent agency in periods when public opinion or statutory policy is slack, indeterminate, or lacking in conviction. The history of the antitrust division of the Department of Justice, for example, is one of alternation between strict and loose enforcement of the antitrust laws. . . .

Congressional action to clarify congressional purpose, coupled with piecemeal amendments to the APA, would strengthen the efforts of agencies to evaluate performance and procedures. If Congress chose to study specific agencies, with a view to concentrating upon individual agency needs, structurally or procedurally, it would further stimulate agency efforts at self-improvement.[63] The work of the Advisory Panel on Labor-Management Relations Law provides a precise example.[64] Congressional recognition that the Taft-Hartley provisions for structural change in the NLRB (which resulted in "two-headed administration") were "a costly mistake," has led to concentrated study of the NLRB, by the Panel, as an agency that, with respect to areas of concern, type of litigation, and function, is unique. Recommendations of the Panel, therefore, have been framed, taking into account the distinctive functions of the NLRB.

Congress has been urged, particularly by the American Bar Association, to adopt

[61] For a good account of the operations of the Office of Administrative Procedure, see Remarks of John F. Cushman, Director, Office of Administrative Procedure, Dep't of Justice, in *Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary on S. Res. 61*, 86th Cong., 1st Sess. 211 *et seq.* (1959).

[62] Jaffe, *The Independent Agency—A New Scapegoat*, 65 YALE L.J. 1068, 1074 (1956).

[63] This approach appears particularly desirable in view of individual agency efforts to improve their methods and procedures. In the last two years, the AEC adopted a code of ethics; the ICC streamlined its procedural rules; and the NLRB has almost completed total revision of its administrative rules. S. REP. No. 168, at 3.

[64] Advisory Panel on Labor-Management Relations Law, *Report to the Senate Committee on Labor and Public Welfare*, S. Doc. No. 81, 86th Cong., 2d Sess. (1960).

a Code of Federal Administrative Procedure that would supplant totally the APA. Analysis of the proposed Code is beyond the scope of this paper, but we should like to indicate, in broad terms, what its objectives seem to be.

In essentials, the proposed Code reflects the view that procedures must be formal if they are to be fair, and that the regulatory process will improve in proportion to the degree to which it becomes "judicialized" in its methods and more directly controlled by the Congress and the courts. For example, the APA definition of rule-making included agency statements of "particular" application and future effect as well as statements of general application and future effects.[65] The proposed Code moves in the direction of formalization of procedure in a definition of rule-making that, being limited to statements only of general application and future effect, places statements of "particular" applicability and future effect in the category of adjudication. Further evidence of the "remarkable vitality of the lawyer's concern with the administrative process"[66] is apparent in the proposed Code's provisions that would (1) "further restrain adjudicatory proceedings";[67] (2) significantly alter the role of the hearing officers;[68] and (3) materially enlarge opportunities for judicial review of final agency action or proceedings prior to final action.[69]

In the view of one critic, the proposed Code would place agency heads "between an upper and a lower millstone," and he added, "I think this code misconceives the principal problems that should concern us in relation to administrative processes."[70] There is, currently, considerable congressional sentiment in support of this critical attitude.[71] If Congress chooses to reject the proposed Code as a course of action, it will, by its choice, give tangible assent to two fundamental points of view: first, the APA does suffer from many imperfections, but it has been effective and can be made more effective "given sympathetic and imaginative interpretation";[72] second, the problems that confront the administrative process require more for their solution than "increased formalism in agency proceedings."[73]

One further course of congressional action is possible, and perhaps even likely: substantially increased legislative oversight through reliance on structural and

[65] 60 Stat. 237 (1946), 5 U.S.C. § 1001(c) (1952).

[66] Jaffe, *Basic Issues: An Analysis*, 30 N.Y.U.L. REV. 1273 (1955).

[67] Pleadings, for example, are required to conform closely to the pleading requirements in United States district courts. Code of Federal Administrative Procedure § 1004(a) (proposed).

[68] In adjudicative proceedings, the hearing officer would be barred from any consultation, even with members of the agency staff, in the course of formulating an initial decision. *Id.* § 1005(c). Further, hearing officers' decisions on questions of evidentiary fact would be required to stand unless "contrary to the weight of the evidence." *Id.* § 1007(c).

[69] Under the APA, an agency determination of fact may be reversed if unsupported by substantial evidence. Under the terms of § 1009(f) of the proposed Code, the standard for reversal would be broadened "to the formula now applicable to appellate review of non-jury district court determinations of fact, whereby determinations which are clearly erroneous on the whole record may be reversed." Further, courts could "stop agency investigations either when the agency comes to court seeking enforcement of a subpoena or in a new type of proceeding to enforce agency investigations." *Id.* § 1005(a), (b).

[70] Fuchs, *The Proposed New Code of Administrative Procedure*, 19 OHIO ST. L.J. 423, 431 (1958).

[71] See S. REP. No. 168.

[72] *Id.* at 11.

[73] *Ibid.*

procedural devices that would increase legislative involvement in the administrative process.

One possibility of this kind is the proposal to establish a permanent standing Committee on Administrative Procedure. Such a committee should (1) "screen and study complaints" relating to agency procedures in the interest of fair play and due process; (2) ". . . exercise continuous watchfulness over the APA and laws of like character"; and (3) ". . . determine whether the administrative agencies are complying with the requirements of the APA and laws of like character, and with the principles they embody. . . ."[74]

This proposal is objected to in some quarters on the ground that it implies, mistakenly,[75]

> that the House and Senate Judiciary Committees which handled the Administrative Procedure Act are no longer competent to deal with this subject . . . that the various standing committees of the House and Senate with jurisdiction over specific administrative agencies are no longer competent to oversee the procedure of the agencies committed to them . . . that major changes in administrative procedure somewhat along the lines of the Second Hoover Commission Task Force Report are in order, and that, because the Judiciary Committees and other standing committees have failed to act on these proposals, some new committee should be created so to act.

Criticism further goes to the point that a separate committee will not be "oriented to the substantive role of the agency."[76] In addition, given some of the arguments advanced to justify a "supercommittee," such a committee might be regarded as a means by which to press the cause of judicialization.[77]

Supporters of the proposal do not deny the necessary relationship of procedure to substance, but argue (1) there are certain aspects of administrative procedure in which all administrative agencies share; (2) substantive tasks of the established committees are vast and necessarily preclude effective oversight of procedure; and (3) established committees would have continuing contact with all agencies.

If Congress chooses to strengthen its oversight function, there are several other procedural devices at its disposal that could be relied upon more extensively. Watchdog committees have clearly demonstrated their capacity to increase legislative oversight and control. The history of the Joint Committee on Atomic Energy is a clear case in point.[78] Legislative involvement in pending administrative matters; prior committee clearance of administrative decisions;[79] prior congressional approval of administrative action by resolution;[80] legislative review of, and authority to annul,

[74] See generally *Hearings Before a Special Subcommittee of the House Committee on Rules, Under Authority of H. Res. 462*, 84th Cong., 2d Sess. (1956).

[75] Remarks of T. F. Broden, in *Hearings Before the Subcommittee of the House Committee on Interstate and Foreign Commerce on Administrative Process and Ethical Questions*, 85th Cong., 2d Sess. 104-05 (1958).

[76] *Ibid.*

[77] *Hearings*, *supra* note 74, at 81.

[78] See Morrisson, *supra* note 32.

[79] See Ginnane, *supra* note 32.

[80] See Cotter & Smith, *Administrative Accountability to Congress: The Concurrent Resolution*, 9 W. POL. Q. 955 (1956).

federal regulations[81]—these techniques give to Congress a formidable array of opportunities to become significantly more visible in the administrative process.

CONCLUSION

In its treatment of problems of administrative regulation, Congress has played an ambivalent role that cannot be clearly analyzed without much more attention than has yet been given to it. As has been pointed out, the growth of regulatory administration would not have been possible without congressional sustenance, and Congress has been the prime molder of the regulatory system that has been developed. Nevertheless, Congress has often shown a mood of apprehension concerning the evil inclinations of its offspring among the regulatory agencies.

Some of the reasons for this mixture of parental pride and concern can be surmised. Basically and in the long run, Congress has responded positively to what was perceived as necessary action in enacting regulatory programs and creating regulatory agencies. Misgivings and second thoughts, leading to control measures, can be traced tentatively to several sources. One is a natural reluctance on the part of Congress to disturb the balance of power between the legislative and executive branches in the direction of executive enhancement—and the regulatory agencies have increasingly become identified with the executive side of government. As legislators have realized this, they have frequently reacted in the direction of narrowing the scope of regulatory action or by shifting much of the work of regulatory agencies either to the legislature or to the courts.

Another consideration is that opponents of regulatory programs who have failed to prevent the imposition of regulation have often then turned their efforts toward hampering restrictions on the effectiveness of regulatory operations and have received a more sympathetic hearing. Also, Congress has shown a special willingness to consider favorably suggestions for procedural reforms put forth by spokesmen from the legal profession—no doubt in part because of the preponderance of lawyers among the members of both houses. At the same time, the technical complexities of proposed reforms sometimes make it difficult for many members of Congress to make an informed judgment on measures under consideration.

If Congress has failed to work out a consistent approach or definitive solutions to the issues posed by the regulatory process, however, the explanation does not lie primarily in shortcomings of understanding by legislators. Instead, the persistence of regulatory dilemmas is due to deficiencies in our knowledge of how regulatory administration actually functions, and a preoccupation with procedural devices for resolving what are really great issues of public policy. That Congress is becoming more receptive to a reconsideration of regulatory problems is clearly evident. A recent Senate subcommittee report[82] offers significant reason to hope that con-

[81] See Schubert, *Legislative Adjudication of Administrative Legislation*, 7 J. PUB. L. 134 (1958); Schwartz, *Legislative Control of Administrative Rules and Regulations: The American Experience*, 30 N.Y.U.L. REV. 1031 (1955).

[82] S. REP. No. 168.

gressional action will reflect several of the approaches suggested in this paper. The subcommittee report shows an awareness of the need to think above and beyond the procedural questions; it implies that fairness in administrative life is more complicated to achieve than has perhaps been understood; it proffers the hope and expresses the need of cooperative legislative-executive relations as each group tries to upgrade the administrative process. In short, Congress seems to be more inclined now than ever before to search for concepts that may lead to an administrative process that is both vigorous and effective in the achievement of its initial goals, as well as those not yet perceived. There may be "no single center of gravity in the regulatory system,"[83] but Congress is perhaps in the prime position to lay out the paths for development of administrative regulation.

[83] McFarland, *Landis' Report: The Voice of One Crying in the Wilderness*, 47 VA. L. REV. 373, 437 (1961).

RESPONSIBILITY OF PRESIDENT AND CONGRESS FOR REGULATORY POLICY DEVELOPMENT

HUGH M. HALL, JR.*

There is nothing novel in the assertion that the process by which policies are formulated in the American system of government is a complex one. Yet acknowledgment of this fact of complexity is a necessary starting point in any meaningful attempt to describe and evaluate the relations of the President and Congress to the regulatory process, and the extent to which they provide effective guidance and control of the development of regulatory policies.[1] The reasons for complexity are well-known: they derive not only from the magnitude and difficulty of many of the policies themselves, but also from the social and economic characteristics of America and from the political and governmental institutions through which policies are evolved. As a reminder of these latter conditions, one need only mention the diversity of interests that characterizes our society; the freedom afforded such interests to organize and express their wishes politically; the resulting play of competing forces upon and within our political parties and governmental institutions; and the built-in separation and competition within government itself, with domination—or even leadership—guaranteed to neither President nor Congress and with neither branch assured of unity of purpose or operations.

The implications of such complexity for the role of President and Congress are clear. In the first place, the assignment of responsibility for the actions of government, whether of a regulatory or nonregulatory nature, is difficult. To say that the President and Congress—either singly or jointly—are the agents for the development and ultimate control of policies is frequently only the beginning of analysis and description. A more realistic description would require, for example, at least an analysis of the political programs and movements of relevant interest groups for whom both the President and Congress are but agents or spokesmen.[2]

But accepting for symbolic and practical reasons the primary role of President and Congress in the policy-making process, we must emphasize that theirs is a shared and overlapping and, not infrequently, a conflicting responsibility.[3] While by no means a novel point, this is a factor that is too frequently ignored by those con-

* B.A. 1942, Southern Methodist University; Ph.D. 1953, University of Texas. Assistant Professor of Political Science, Duke University. Staff Member, Special Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce, U.S. House of Representatives, 1959-60.

[1] As used in this article, the term "regulatory policies" refers mainly to those programs administered by the so-called independent regulatory commissions and by agents within executive departments who are required by law to follow procedures not dissimilar to those employed by the independent agencies. Outside the scope of this definition, unless otherwise indicated, are policies that are broadly regulatory in nature (such as fiscal policies) and are administered in more truly executive fashion by agents directly responsible to the President.

[2] See, *e.g.*, an analysis of this type in DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS *passim* (1958).

[3] LAWRENCE H. CHAMBERLAIN, THE PRESIDENT, CONGRESS AND LEGISLATION 448-64 (1946).

demning both the substance of regulatory programs and the organizational forms employed to administer them. To stress the practice of shared responsibility, however, is not to insist upon an invariable pattern, nor to contend that such sharing is equally applicable to all types or levels of regulatory policy-making. There are instances in which Congress, for example, as compared with the President, bears almost sole responsibility for new regulatory schemes.[4] In addition, a distinction must be made between the responsibility of the President in the initiation of policy for statutory enactment, where traditionally he has played a significant role, and his responsibility for subsequent development of administrative policies under the statutes, where for reasons to be mentioned later his role has been far less important.

In reaction to the fact of complexity and the diffusion of responsibility that accompanies it, there has developed the tendency of presidential "aggrandizement," to use the term of Professor Corwin, or the assumption by the President from time to time of a position of leadership vis-à-vis the Congress for the purpose of effecting new regulatory programs.[5] There is only a seeming contradiction between such presidential initiative and the pattern of shared responsibility between the two political branches. The presidential role is one only of leadership and not of domination or of a displacement of the Congress. Further, the role is not continuously played by the President or always effective when attempted. Regardless of the uneven application of such leadership, however, its growth over the course of the nation's history is among the more well-known aspects of executive-legislative relations. It is generally conceded to have resulted both from the greater political leadership potential of the unified presidential office and from a relative lack of such potential in the dispersed political and organizational form of the Congress.[6]

Another aspect of this same reaction to the dispersion of political authority and to the complexity within the policy process has been a realization of the need of some degree of coordination and control above the operating agency level of the administrative phase of policy development. Both President and Congress have been recognized as agents for achieving such goals. But once again, at least in the literature and recommendations of specialists concerned with administrative reorganization, the President has generally been considered more capable of effecting coordination and exercising those controls that are necessary for achieving political responsibility of administration in a democratic society.[7] Accomplishments along this line, however, while not insignificant when viewed from the total perspective of the entire executive branch of government, have admittedly been quite limited with regard to regulatory administration, particularly in view of the prominent role

[4] *Id.* at 451.

[5] EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 29-30 (1957). See also his article, *The Presidency in Perspective*, in ROBERT S. RANKIN (ED.), THE PRESIDENCY IN TRANSITION 7 (1949).

[6] WILFRED E. BINKLEY, THE MAN IN THE WHITE HOUSE 142-60 (1958).

[7] E. PENDLETON HERRING, PUBLIC ADMINISTRATION AND THE PUBLIC INTEREST 347 (1936), and PRESIDENTIAL LEADERSHIP 46-72 (1940). For a somewhat more qualified view, see CHARLES S. HYNEMAN, BUREAUCRACY IN A DEMOCRACY 56-72 (1950).

played by independent boards and commissions in the execution of regulatory programs. Yet the need of some type of overhead control and coordination is still recognized, even by those who are partisans of the independent agencies.[8]

A final relevant characteristic of the complexity in the political process is that the Congress, so organized as richly to express the diverse interests that compose it, continues to play a forceful role in the initial declaration of regulatory policies as well as in subsequent attempts to shape the content of programs developed by administrators under the statutes. In the latter aspect of its role, the Congress is assisted greatly by the "independent" character of the regulatory commissions that it considers, perhaps inconsistently, "arms of the Congress" and over which it jealously exercises "legislative oversight."

I

RESPONSIBILITY OF THE PRESIDENT

In analyzing and evaluating the responsibility of the President for the development and control of regulatory policies, at least two sets of distinctions should be kept in mind: first, that between the role of the President as formulator (or advocate) of policies for enactment by the Congress, and that as developer of administrative policies under terms of basic regulatory legislation; and second, the distinction between the President and his staffs of personal assistants and advisers, and the "Presidency," meaning in effect the executive establishment theoretically under control of the chief executive. Obviously, both sets of distinctions are somewhat artificially drawn and should not be thought to represent more than broad categories to facilitate clarity of analysis. Moreover, further refinements properly could be drawn so as to distinguish different aspects of some of the roles here noted. For example, analysis of the role of the President as developer of administrative policies might well take into account, on the one hand, the President's relations with a single regulatory agency or program in which, by virtue of specific statutory provisions, he is permitted to intervene;[9] and on the other, those relations with several agencies whose policies, in the President's view, require a degree of coordination. While such refinements have pertinence for later portions of this article, attention at this point will center upon the two sets of broad distinctions noted above.

A. Formulator of Statutory Policies

The history of regulatory policy development in the national government is replete with illustrations of the energetic and successful role played by the President in formulating and advocating policies for enactment by the Congress.[10] It is mainly this function we have in mind when we speak of the President as "chief legislator." Such responsibility is derived not only from constitutional provisions, but also, and

[8] JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 24, 30 (1938).

[9] An example is his authority in foreign or overseas air route certification by the CAB. 72 Stat. 782, 49 U.S.C. § 1461 (1958).

[10] CHAMBERLAIN, *op. cit. supra* note 3, *passim*.

more importantly, from the position of political leadership that he occupies. In this latter capacity, he is spokesman for political interests and groups whose policy objectives, without presidential support, might otherwise be blocked by opponents in the Congress. This policy-forming role of the President, especially as it relates to a particular proposal, is apt to be transitory in nature, however, lasting only so long as political backing exists and the limited time and energy of the President permits.[11] Its more dramatic and noticeable instances are associated with broad and significant innovations in the law, although regulatory statutes of narrow and less important character are known to have resulted from, or been influenced by, presidential recommendation.[12]

B. Developer of Administrative Policies

In the development of administrative policies, however, the President has not enjoyed such influence. Theoretically at least, the case should perhaps be otherwise, particularly in view of constitutional prescriptions that seem to invest him with the executive power of the government.[13] And in reality, certain factors do enable the President to influence the administrative formulation of regulatory policies: his authority to appoint and, under certain conditions, to remove key officials; his power to designate the chairman of most of the independent commissions; his ability in some instances to review and approve administrative decisions; his control over administrative budgets;[14] and, to paraphrase the views earlier expressed by James M. Landis, "the over-shadowing stature of the President in matters of policy" that enables his view to prevail in a showdown with competing administrative agents.[15]

Despite these sources of strength, however, the President's role in administrative policy formation is severely limited. (Examples to the contrary are frequently drawn from periods of war and other disaster and, therefore, are not entirely appropriate indications of presidential potential in the absence of emergency.)[16] There are several immediate reasons for this limited role. Statutory provisions not infrequently place primary or sole authority in officials other than the President, although such officials are members of executive departments traditionally considered subject to

[11] TRUMAN, *op. cit. supra* note 2, at 398-404.

[12] For an estimate of the comparative influence of President and Congress on specific statutes enacted during this century, see CHAMBERLAIN, *op. cit. supra* note 3, at 450-52.

[13] U.S. CONST. art. II. For an extensive treatment of the ambiguities that surround the meaning of the executive power in the Constitution, see CORWIN, *op. cit. supra* note 5, at 69-169. Professor Truman refers to the "magnificent ambiguities" concerning the President's constitutional role as "chief executive." TRUMAN, *op. cit. supra* note 2, at 401.

[14] These and other factors providing a basis for presidential influence of the independent regulatory agencies are discussed in EMMETTE S. REDFORD, ADMINISTRATION OF NATIONAL ECONOMIC CONTROL 277-83 (1952). Professor Redford concludes: "Plainly, there is a conflict of trends on the independence of the regulatory commission. Presidential power bucks tradition. Facts run counter to the theory that the commissions are 'wholly free from control by the President.'" *Id.* at 283.

[15] Note James M. Landis's comment to that effect in *Administrative Process and Ethical Questions, Hearings Before the Special Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce*, 85th Cong., 2d Sess. 96 (1958).

[16] Sturm, *Emergencies and the Presidency*, in RANKIN, *op. cit. supra* note 5, at 121.

presidential direction.[17] An even more basic reason is Congress' practice of placing regulatory programs in organizations relatively free of the President's authority—that is, in the independent regulatory commissions.[18] Moreover, opportunity for intervention by the President into administrative policy formation is limited by procedural requirements designed to guarantee due process to persons subject to the law. An example of such requirements is the practice, either prescribed by statute or sanctioned by custom, of determining administrative policies by judicial-like, "on-the-record" proceedings.[19] Such proceedings are used particularly, although by no means exclusively, by the independent regulatory commissions for policy development and are frequently severely criticized by many students as obstacles not only to planning and timely policy formulation by the commissions, but also to necessary policy direction and coordination by the President.[20]

C. President and the "Presidency"

But a more fundamental reason is found in the complexity of the American political environment, to which we have previously referred, and the resulting diffusion of power within the structure of the executive branch of government that the President nominally heads. Political scientists and students of public administration in recent times have taken an optimistic view of the potentialities of presidential control of administration and have advocated structural and other changes to secure an integrated, coordinated approach toward policy development.[21] They rightly stress the institutional character of much presidential decision-making and the resulting need of certain administrative arrangements to facilitate the securing of timely, consistent, and responsible decisions. With such arrangements, they suggest, the gap between the President and the executive branch can be narrowed,

[17] ". . . there is not too great a difference between the allegedly 'independent' agencies and those technically a part of some Executive Department. The President's arbitrary interference with the operations of the Commodity Exchange Administration would be subject to resentment equal to that engendered by a similar interference with the Securities and Exchange Commission. The same would hold whether it involved Food and Drug Administration or the Federal Trade Commission." JAMES M. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 30 (1960) [this report has been published as a committee print by the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 86th Cong., 2d Sess. (1960); it is hereinafter cited as LANDIS REPORT].

[18] MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 127-63 (1955). See also REDFORD, *op. cit. supra* note 14, at 275-76.

[19] The prevalence of a judicial-like approach to decision-making in the agencies, particularly as it affects the ability of the President to play a role in policy formulation, raises, as is noted more fully in latter portions of this article, the question of separation of functions in regulatory administration. If decisions are to be reached on the basis of facts set forth "on the record" by methods typical of courts, then, the question is asked, how can the President be permitted to influence the decision without destroying the judicial character of the process? One answer, of course, has been to separate completely the planning and rule-making duties of an agency from its judicial duties, thereby enabling the President to intervene in the performance of the first but not the latter duties. The obvious inference of this proposal is that such separation can be made without seriously crippling the administration of the law. But see *infra* notes 21-23.

[20] BERNSTEIN, *op. cit. supra* note 18, at 179-82.

[21] PRESIDENT'S COMM. ON ADMINISTRATIVE MANAGEMENT, ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES *passim* (1937). The Committee was composed of three well-known political scientists and/or students of administration.

if not closed, and the symbolic role of presidential leadership, authority, and responsibility for policy formation can be made a reality. Yet the complex and diffused character of political power, mentioned above, produces a major distinction between the President and the "Presidency," or between the President as a powerful but nonetheless politically limited occupant of the executive office and the executive establishment that he heads. Professor Corwin tells us that the entire history of the presidential office has been one of aggrandizement.[22] Moreover, the last several decades record a continuing and on-the-whole successful effort to make the President a more effective chief executive.[23] But the growth of power and effectiveness is a relative matter and must be measured not only against the weaker and less effective conditions of the past, but also against the obstacles of the present. A realistic appraisal of current conditions will show that a significant obstacle is the diffusion of power within the executive branch of government itself, the effect of which is to create an important gap between the President and the many executive departments and agencies that mere organizational and management improvements cannot fully close.[24] The "Presidency"—so frequently used in an almost unthinking way as a substitute term for the President—is, in reality, a great mass of people and agencies that, in organizational form, has only a partial resemblance to the unity of the presidential office. As a consequence, men theoretically responsible to the President are free at times to recommend and develop policies either beyond the concern or knowledge of the chief executive or in direct contradiction of expressed presidential views. In this regard, the executive branch displays many of the separatist characteristics of the Congress, and for the same reasons. Of course, the point must not be carried too far; but at least it must be acknowledged. Otherwise we may expect too much of the President not only as formulator of policies for enactment by the Congress, but more importantly for our purposes here, as developer of administrative regulatory programs.

II

EXECUTIVE INTEGRATION AND INDEPENDENT REGULATORY AGENCIES

Much of the foregoing description of the President's role in administrative regulation can be illustrated through a brief review of proposals and efforts in the last twenty-five years to integrate the independent regulatory agencies into executive departments.

A. Meaning and Goals of Executive Integration

The idea of executive integration of administration has occupied an important place in both the literature and practice of American government throughout this

[22] CORWIN, *op. cit. supra* note 5, at 29-30.

[23] A similar judgment is expressed by Fritz Morstein Marx elsewhere in this symposium. See Morstein Marx, *Administrative Regulation in Comparative Perspective, infra* at 307, 313-14.

[24] Long, *Power and Administration*, 9 PUB. ADMIN. REV. 257 (1949).

century.[25] In fact, it is possible to speak of an "integrationist movement" operating on all levels of government: the establishment of strong-mayor and city-manager systems in municipal government; state government reorganizations resulting in increased authority of the governor over administrative operations; and the continuing efforts to alter the structure of national administration to bring about a more rationalized organization under control of the President. All of these movements are indicative of the prominence—and, to some extent, the persuasiveness—of the integrationist concept in recent decades.

The meaning of integration is suggested, perhaps somewhat formally, in terms of the following requirements.[26] In the first place, authority for the direction of administration should be concentrated in the hands of the elective chief executive. Secondly, similar functions should be grouped in the same departments or agencies in order to promote consistency and reduce overlapping and waste in the application of the law. Third, each of the departments should be headed by a person appointed by, and responsible to, the chief executive, who delegates a portion of his authority to each department head. Fourth, to facilitate effective control of his subordinates and all administrative operations, the chief executive should have a relatively narrow "span of control"—that is, he should attempt to supervise the activities of as few subordinates as possible. Therefore, the number of department heads directly responsible to the chief executive should be kept to a minimum feasible with effective operations. As a fifth requirement, the chief executive should have at his disposal certain necessary facilitative powers and staff assistance in order that he might be the chief administrator in fact as well as in name; for example, powers and staff aids in the areas of budget, planning, and personnel. Sixth, the chief executive alone should be considered the responsible agent and spokesman of administration, and consequently he, rather than his subordinates within the integrated structure, should be held accountable to the legislature (and the people) for the conduct of administration. Implicit in this requirement is the assumption that the legitimate functions of both the executive, in directing the administration of the law, and the legislature, in seeing that the law is responsibly administered, will be best achieved if each approaches the other through its leadership on a relatively unified, nonpiecemeal basis. This in turn assumes (or posits as necessary or helpful), in addition to integration of the executive branch, the existence of a fairly high degree of legislative integration, with resulting strength in its leadership and relative weakness in its subunits of organization, such as committees and their chairmen. A final requirement of particular importance for our purposes here is that much of the substantive policy to be followed by departments and agencies should be determined by the chief executive, or, at least,

[25] A brief account of the history of American public administration, including the role of the chief executive, is presented in LEONARD D. WHITE, INTRODUCTION TO THE STUDY OF PUBLIC ADMINISTRATION 13-60 (1955).

[26] For a description of the "integrationist model," see JOHN M. PFIFFNER & ROBERT V. PRESTHUS, PUBLIC ADMINISTRATION 197-213 (1960).

formulated in his name. Two considerations support this requirement. First is the fact that administration, far from being concerned merely with the simple, and neutral, application of policies already clearly determined by the legislature, is itself intimately involved in the formulation of policies under the basic statutes.[27] And second is the requirement previously mentioned, that in an integrated administration, authority is vested in the chief executive. Since this is the case, he should be empowered to determine the substance of administrative policies under authority of controlling legislation. One practical consequence of this requirement is to deny the legislature the privilege of placing final authority for administering the laws in the hands of officials subordinate to the chief executive or in organizations independent of his control. One possible exception to the requirement, however, and an important one as we shall explain more extensively below, concerns policies affecting individual rights determined by judicial-like processes.

Executive integration is desirable, according to its exponents, on several grounds. Increased economy and efficiency in administrative operations almost always figure prominently in the reasons offered for a more integrated structure of government.[28] Such results, however, are frequently difficult to prove and often appear as little more than ways of attracting support of tax-wary electorates and legislators for reorganization proposals. The really basic reasons for integration are twofold: more effective responsibility on the part of administrators, and greater consistency and vigor in administrative policy development.[29] The achievement of each of these goals, it is said, is dependent mainly upon the ability of political leaders of administration to reflect broad public interests and to muster political power sufficient to exact from administrators programs that are consonant with such interests. Integration of the executive branch under the broadly representative and politically powerful position of the elected chief executive is believed to satisfy these requirements. In the national government, for example, the President is considered the most representative agent of the American people. Consequently, he is supposedly capable of taking a broad, rather than a narrow or particularistic, view of governmental policies and of achieving the coordination of administration that is the requisite of consistent programs. Moreover, by virtue of his broad political support, he theoretically also possesses the power necessary to hold subordinates accountable to the policies that he formulates in the public interest.[30]

[27] Friedrich, *Public Policy and the Nature of Administrative Responsibility*, in C. J. FRIEDRICH & EDWARD S. MASON (EDS.), PUBLIC POLICY 5 (1940).

[28] Not all government reorganizations are undertaken to provide greater integration of the structure and operations of administration; but practically all *are* justified in terms of economy and/or efficiency. Yet, during this century, reorganization efforts frequently have been guided, in part at least, by the "principles" of integration; when that was so, then integration was another means of achieving economy and/or efficiency. Note, for example, the heavy emphasis placed upon these goals in the reports of the first Hoover Commission. See COMM'N ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, CONCLUDING REPORT *passim* (1949).

[29] PRESIDENT'S COMM. ON ADMINISTRATIVE MANAGEMENT, *op. cit., supra* note 21, at 3, 29, 30, 36-37, 41.

[30] *Ibid.*

B. Independent Commissions and the Failure of Integration

We have previously acknowledged that the integrationist concept has not been without influence in the executive branch of the national government. Measured strictly by all of the requirements noted above, the results perhaps have not been great; at least one is still impressed with the "disintegrated" character of the national administration. Yet numerous studies and investigations conducted in recent decades have had that concept as their standard,[31] and certain changes in organizational structure and improvements in management techniques, particularly in the creation of more effective staff assistance for the President, are indicative of the impact of some of the so-called "principles" of integration. Greatest resistance to integrationist claims has come, perhaps, in the area of regulatory administration. Long and continued reliance upon the independent boards and commissions for major regulatory tasks is the most obvious indication of such resistance. In fact, in the late 1930's, when the case for executive integration of the national administration received its most classic statement,[32] some opponents claimed that the integrationist movement centered "around questions concerning the organization, the relationship, the functions, and the control over the actions of independent regulatory boards and commissions."[33] The effects of the movement upon the regulatory commissions at that time were virtually nil, however, and subsequent reorganization studies until recent months either by-passed the issue or found positive reasons for continuing the commissions.[34] And although various factors in the relations between the President and the regulatory agencies have had the effect, over the years, of reducing the degree of agency independence of the chief executive,[35] the commissions remain today as primary examples of a disintegrated national administration.

The fact that "independence" of the regulatory commissions has consisted primarily of freedom from presidential control (rather than from control by Congress or clientele groups)[36] is perhaps enough to explain the concern that they create for proponents of executive integration. In their view, such freedom means the denial of those basic goals of integration that were mentioned above—namely,

[31] Concerning the impact of the integration concept, Professor Fesler has said: "[T]his ideal structure continues to command the respect of all official commissions and committees that have made major investigations of the administrative . . . needs of national, state, and municipal governments." Fesler, *Administrative Literature and the Second Hoover Commission Reports*, 51 AM. POL. SCI. REV. 135-36 (1957), quoted in PFIFFNER & PRESTHUS, *op. cit. supra* note 26, at 198.

[32] Namely, PRESIDENT'S COMM. ON ADMINISTRATIVE MANAGEMENT, *op. cit. supra* note 21.

[33] FREDERICK F. BLACHLY & MIRIAM E. OATMAN, FEDERAL REGULATORY ACTION AND CONTROL 143 (1940).

[34] Examples of generally favorable responses to the independent commissions by official reorganization study groups may be found in the reports of the first Hoover Commission and its task force on regulatory commissions. COMM'N ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, REGULATORY COMMISSIONS *passim* (1949), and TASK FORCE REPORT ON REGULATORY COMMISSIONS *passim* (1949). If the so-called Hector Memorandum, *infra* note 38, is considered a "reorganization study," it qualifies as a recent example of renewed attack upon the independent agencies. The LANDIS REPORT and the REDFORD REPORT, *infra* note 78, do not so qualify, since neither seeks outright elimination of the commissions.

[35] See *supra* note 14.

[36] BERNSTEIN, *op. cit. supra* note 18, at 151-52, 157-60.

effective administrative responsibility, and consistency and vigor in policy development. As the authors of an important study of administrative regulation explained the integrationist view in the 1930's:[37]

> . . . many of the most important problems of present-day economic life, such as the regulation under law of transportation, communications, water power, finance, fuel, trade and commerce, shipping, the tariff, securities and exchanges, labor relations, are given over to independent and separate highly specialized authorities in respect to the entire field of economic regulation.

Moreover,

> . . . whereas the regulatory agencies are applying and developing broad economic and social policies, they are removed from any effective political control comparable to that exercised over other administrative agencies, which are also in some measure formulating policy. The independent boards and commissions are not tied together in respect to policy by the superior executive direction of the President of the United States, since he can exercise very little control over them except through the power of appointment. If the members of a commission are numerous, have staggered terms of office, possess a long tenure, and can be removed only for cause, his control is almost negligible.

Similar points have again been cited in quite recent attacks upon the regulatory commissions.[38]

The failure of the earlier attacks and the continued use of the commissions today invite explanation. The reasons, already suggested in our earlier discussion of presidential responsibility, illustrate rather well the obstacles to increased authority for the President in regulatory administration. The most basic and underlying reason relates to the *political* implications of executive integration. Administrative relationships, say, of President to independent commissions or to bureaus within executive departments, generally reflect existing power relations among participants in the political process, including, in addition to the President and administrative agencies themselves, Congress and relevant interest groups. In very practical terms, proposals for executive integration contemplate not only a rearranging of the somewhat technical administrative relationships within the executive branch of government, but more fundamentally, a restructuring of the power relations of these various participants. In other words, a re-ordering of administrative relationships is the occasion for—in fact, is dependent upon—a re-ordering of political power relationships.[39] This truism of reorganization politics helps explain the failure of attempts to bring the independent regulatory agencies under control of the President. For that failure reflects the President's inability to build sufficient political power to overcome "the strength and vitality" of those relationships among

[37] BLACHLY & OATMAN, *op. cit. supra* note 33, at 168-69. It should be said that the quotations in the text above do not represent the views of the authors of the volume from which they are taken.

[38] Hector, *Memorandum to the President: Problems of the CAB and the Independent Regulatory Commissions*, 69 YALE L.J. 931 *passim* (1960) [this report has been published as a committee print by the Senate Committee on Government Organization, 86th Cong., 2d Sess. (1960)]. See also the LANDIS REPORT and the REDFORD REPORT, *infra* note 78.

[39] This idea is explained more fully in TRUMAN, *op. cit. supra* note 2, at 432-33.

independent agencies, their supporting interest groups, and the diffused elements of leadership in the Congress that profit from a maintenance of the status quo.[40] Such inability, in turn, is traceable to the pluralistic and dispersed character of American politics and the consequent difficulty of generating that unity of political power, in either the Presidency or the Congress, that the theory of executive integration requires.

Other reasons for the failure of executive integration have to do with assumptions about the nature of regulation that supposedly distinguishes it from other types of governmental endeavor and about the most effective and fair organizational means for conducting the regulatory function. These assumptions are felt to justify the existence of the independent regulatory commissions and have been influential in the successful resistance to efforts to integrate the commissions into executive departments of government.

Advocates of executive integration have difficulty in finding truly distinctive characteristics in the substance of regulation that merit its administration by independent commissions rather than by executive departments. Such is not the case, of course, with partisans of regulation by commission. A somewhat lengthy quotation from a study in the 1930's will show an attempt to state the relevant distinctions:[41]

> There is a clear line of demarcation between the types of economic situations controlled by the Government departments and their subdivisions and those regulated by the independent boards and commissions.
>
> Broadly speaking, and with some exceptions, the Government departments and their subdivisions are regulating and controlling business, through an exercise of what is virtually the police power, in the interests of public health, safety, and the prevention of fraud; whereas the independent boards and commissions are dealing with large economic problems such as monopoly, unfair methods of competition, price discrimination, reasonableness of rates and services, preventing speculation, stabilizing industry, regulating competing carriers in such a way as to guarantee adequate air, water, motor vehicle, pipe line, and railway transportation systems, and regulating the relationships between employers and employees. In the first type of regulation, the police formula of regulation is largely applicable; that is, a fixed rule of law, a charge that the law has been broken, and a decision. In the second type of regulation are involved questions of public policy, questions of economic relationship, and problems of public management. The regulatory process necessitates the development of more detailed lines of policy from rather general legislative declarations and also the application of these more detailed policies to specific cases.

Other observers describe the work of the regulatory commissions as concerned primarily with supervising the economic integrity and development of particular industries and with policing certain practices within business or industry as a whole.[42] In each instance, however, stress is placed upon the broad and discre-

[40] The quoted words are Professor Truman's. *Id.* at 433.

[41] The Brookings Institution, *Investigation of Executive Agencies of the Government*, S. REP. No. 1275, 75th Cong., 1st Sess. 769-70 (1937).

[42] JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 23 (1938).

tionary nature of regulatory responsibility, coinciding with particular lines of business, or with given industries, or, in some instances, with the entire economy.

For supporters of the regulatory commission, a consequence of such responsibility is the necessity of establishing organs of government whose legal and technical competence coincides with the realities of the industries or practices to be regulated and whose methods of procedure meet the standards of fairness traditionally required of democratic government. The independent commission, it is felt, best serves these needs. Why this is so was explained by the Hoover Commission task force on regulatory agencies in terms of commission expertness, group decision-making, continuity of policy, and impartiality.[43] It found expertness in the commissions derived from "fixed terms of reasonable duration, and the tradition of reappointment," and from the aid rendered by older to newer members of the agency. Group decisions and policy-making, characteristic of boards and commissions and representing the "combined judgment" of several knowledgeable men, provide "a barrier to arbitrary or capricious action and a source of decisions based on different points of view and experience." Moreover, "group consultative action" reduces the "likelihood of sudden change in policy." Thus, continuity of policy, further assured by long, staggered terms of office and by limits on the removal of members, is another advantage of regulatory commissions, since it enables industrial managers "to plan ahead" and adapt their private operations to the requirements of public policy. And finally, the commission form of organization permits impartiality of regulation and freedom from political control. Again, this is possible by virtue of group leadership and security of tenure, which permit resistance to "outside influence." "Moreover, since the activities of the commission may be more subject to public scrutiny than would be a single bureau in a large department, there is greater opportunity for exposure of pressures or improper actions." Then too, "hearings and similar safeguards against arbitrary actions" may be more effective when combined with group decision-making.

One further justification (and explanation) of the independent commission relates to the necessity of unifying government's approach to the regulation of a particular industry or business practice. Perhaps James M. Landis, in his early and brilliant analysis of the regulatory process, explained best the character of this need and the manner in which the new "administrative" agencies were designed to satisfy it. According to Landis, ". . . the administrative [agency] differs not only with regard to the scope of its powers; it differs most radically in regard to the responsibility it possesses for their exercise. In the grant to it of that full ambit of authority necessary for it to plan, to promote, and to police, it presents an assemblage of rights normally exercisable by government as a whole."[44] Such unifica-

[43] COMM'N ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, TASK FORCE REPORT ON REGULATORY COMMISSIONS 19-25 (1949). The quotations in this paragraph of the text are taken from the pages cited here.

[44] JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 15 (1938).

tion of powers and responsibility in the regulatory agency comports with, or indeed is caused by, a similar unity in regulated industries:[45]

> As the governance of industry, bent upon the shaping of adequate policies and the development of means for their execution, vests powers to this end without regard to the creation of agencies theoretically independent of each other, so when government concerns itself with the stability of an industry it is only intelligent realism for it to follow the industrial rather than the political analogue. It vests the necessary powers with the administrative authority it creates, not too greatly concerned with the traditional tripartite theory of governmental organization. The dominant theme in the administrative structure is thus determined not primarily by political conceptualism but rather by concern for an industry whose economic health has become a responsibility of government.

Similar disregard of the "triadic contours" of organization and function derived from the theory of separation of powers is evident also in those commissions responsible for policing business practices rather than whole industries.[46] And although the combination of various powers, methods, and instruments in a single commission is regarded by some as a source of administrative unfairness,[47] or a barrier to adequate policy planning,[48] or an impediment to government-wide coordination of policies,[49] such a unified approach is strongly defended, as indicated above, as necessary to the balanced and effective development of regulatory programs.

These various claims and assumptions regarding the nature of administrative regulation and the qualities of regulatory commissions are said to justify independence from presidential control. No attempt will be made at this point to evaluate these assumptions—that is, to question the alleged distinction between executive-type and commission regulatory programs, either as to the substance of such programs or methods and procedures employed, or between the relative capacities of departments and commissions for fairness and expertness in administration of the law.[50] We need only acknowledge that regardless of the soundness of such distinctions, these arguments in favor of independent commissions have appeared sufficiently persuasive to account, in part at least, for the failure of the integrationist movement in the national government.

More specifically, this failure is traceable to the inability of proponents of integration to offer alternative suggestions that appear capable of providing the benefits allegedly arising from the commission form of organization, while at the same time achieving the basic goals of executive integration. Or to state the matter differently, the failure is revealed in the inability of integration proposals to provide acceptable

[45] *Id.* at 11-12.

[46] *Id.* at 16.

[47] ROBERT E. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 700-01, 708 (1941). The American Bar Association's continuing plans to "remedy" this situation are mentioned elsewhere in this symposium. Benjamin, *A Lawyer's View of Administrative Procedure—The American Bar Association Program*, *supra* at 203.

[48] Hector, *supra* note 38, at 932.

[49] CUSHMAN, *op. cit. supra* note 47, at 688.

[50] Redford's evaluation of the Hoover Commission task force's views on the independent agencies is pertinent here. EMMETTE S. REDFORD, ADMINISTRATION OF NATIONAL ECONOMIC CONTROL 286-87 (1952).

answers to such basic questions as these: Which aspects of commission duties or functions should come within the authority and responsibility of the President? How is executive integration of regulatory administration to take place without, at the same time, sacrificing (or appearing to sacrifice) those values of fairness and impartiality of administration that the independent commissions supposedly assure? How can the regulatory responsibilities of the President be increased and fairness and impartiality of decision-making assured without, at the same time, so disunifying the regulatory process as to render it less effective than it presently is? Essentially, two related problems are involved in these questions: first, that of providing government-wide direction and coordination of regulatory policies under the President; second, that of assuring impartiality and objectivity of the judicial functions in the context of such an integrated administration. And underlying both problems is the issue of unified versus disunified administration of regulatory programs on both the agency and government-wide levels.[51]

Proponents of executive integration have sought answers to these questions—or solutions to the underlying problems—largely in terms of separation of functions.[52] Viewing the independent commissions as serious obstacles to responsible policy formation and coordination, they have proposed that the President (or departments under his control) be given authority over those aspects of commission programs that involve the determination of policy, in addition to such traditional executive-type duties as investigations and law prosecution.[53] But also acknowledging the need and desirability of fairness in the judicial-like functions of the regulatory process, they have advocated the creation of special, isolated bureaus within executive departments[54] or the establishment of administrative courts[55] to carry out the judicial duties now performed by commissions. In both instances, the rationale is that of the separability of commission functions, and the recommended result, in addition to doing away with the independent commissions, is the division of the currently unified approach to regulation among two or more organs of government.

Such a result has not been acceptable, to date, to the Congress, the regulated industries, or, of course, the commissions themselves. While the reasons for rejecting these proposals are mixed, two factors about commission operations appear to have had significant influence. One relates to the question of impartiality and fairness; the other, to the unity of functions on the operating agency level, as mentioned above. In the first instance, it is said that the internal separation of functions within the agencies themselves, particularly as required by the Administrative Procedure Act, largely solves the problem of unfairness that arises from the combination of prosecuting and judging functions in the same hands.[56] And in the second instance,

[51] *Id.* at 314-15, where reference is made to "a problem of unity at two levels."

[52] PRESIDENT'S COMM. ON ADMINISTRATIVE MANAGEMENT, *op. cit. supra* note 21, at 37-38. See also CUSHMAN, *op. cit. supra* note 47, at 708; Hector, *supra* note 38, at 960, 962.

[53] Hector, *supra* note 38, at 960-61.

[54] PRESIDENT'S COMM. ON ADMINISTRATIVE MANAGEMENT, *op. cit. supra* note 21, at 37.

[55] Hector, *supra* note 38, at 962.

[56] The relevant provision of the Administrative Procedure Act is § 5(c). 60 Stat. 239 (1946), 5 U.S.C.

a strong case is offered to confirm the difficulty of separating the functions now in the regulatory commissions and distributing them among different organs of government. Moreover, the wisdom of such a separation is questioned in view of the intimate relationship among the various administrative methods employed in the over-all effort of an agency to accomplish its regulatory job.[57] For example, proposals to distribute the policy-making and planning functions of the Civil Aeronautics Board to an executive department and its adjudicatory function to a "true administrative court"[58] are attacked as providing too facile an answer to the interrelated problems of effectiveness and fairness of CAB route-certification proceedings.[59] For a decision as to which cities are to obtain new flight service, it is said, may well depend upon which carriers are willing to provide it. The intimate relationship between these two aspects of a single problem, therefore, makes difficult the classification of one as "policy-making" and of the other as "policy-application," and argues for the performance of both by the same administrative agency. For this and related reasons, the necessity of a unified approach to single regulatory programs has been successfully presented and has seemed of greater importance than the unification or integration of all such programs under authority of the President.

III

RESPONSIBILITY OF CONGRESS

Congress exercises its responsibility for the development and control of regulatory policies in two basic ways: first, by legislation, which creates the substance of policies and the organizational and procedural forms through which such policies are administered, and provides the money necessary to their support; and second, by

§ 1004 (1958). Kenneth C. Davis's conclusion regarding the purpose and effect of this provision is as follows: "The main idea of the APA—internal separation—has proved itself generally sound and workable. Deficiencies of the APA provisions relate mostly to the refinements, especially the inapplicability of the provisions to some functions that call for separation of functions." 2 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 13.11 (1958). For the majority views of the Attorney General's Committee on Administrative Procedure, which helped to shape the provisions of § 5, see Attorney General's Comm. on Administrative Procedure, *Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess. 55 (1941).

[57] A fairly typical, if perhaps somewhat prejudiced, expression of this viewpoint is found in the following statement of the General Counsel of the CAB in reaction to the Hector Memorandum: "Just as in theory the Board's functions are not and were not intended to be clearly segregated as policy-making and adjudication or legislative and judicial but an amalgamation of both, so in actual fact and practical application they are inseparable. The broad policy objectives and guidelines of the Act permeate virtually every action and decision by the Board. In authorizing new routes or fixing mail rates, for example, the Board is, of course, adjudicating in the sense that it is affecting private rights, but it is doing so only as a part of a broader Congressional purpose and always with the general policy objectives of the Act in mind. Adjudication is thus not an end in itself but a tool for proper effectuation of the public interest." *Detailed Analysis and Evaluation of the Hector Memorandum to the President* 17 (1960) [this may be found in *Independent Regulatory Agencies Legislation, Hearings Before the House Committee on Interstate and Foreign Commerce*, 86th Cong., 2d Sess. 465 (1960)].

[58] Hector, *supra* note 38, at 960-63.

[59] Auerbach, *Some Thoughts on the Hector Memorandum*, 1960 WIS. L. REV. 186 (1960).

surveillance of the administration of regulatory programs.[60] In addition, the Senate may influence the formulation of policies through its power to confirm or reject presidential nominees to administrative positions. Ordinarily, the performance of each of these functions is greatly influenced by the diversity of interests represented by the membership of the Congress, the disintegrated character of its organization and leadership, and the rules and traditions of its procedure, which, to a great extent, naturally reflect the diversity and looseness of organization in the two houses.[61] Although the increased size and complexity of regulatory programs have caused an immense expansion of policy development by the President and administrative agencies, Congress shows no disposition to relinquish its own basic controls. In fact, the record of recent years indicates an increased involvement of Congress in the details of regulatory administration.[62]

A. Regulatory Legislation

It is the responsibility of Congress to declare by legislation the basic policy of a regulatory program. No issue arises regarding its right to perform this function. Rather, questions are directed to the effectiveness of its performance. Such questions as these reveal the really fundamental problems involved: Is the policy embodied in the statute relatively clear? Are its goals specified? Are there clear and consistent standards for guidance of the administrators? Has Congress resolved certain basic issues inherent in the regulation intended, or has it passed an impossible task on to the regulatory agency? Is the policy realistically conceived and adequate to meet the problems involved? Are administrators equipped with sanctions sufficient to the tasks before them? Are statutory policies kept relatively up to date in response to changing conditions and needs? Not all of these questions can be answered on the basis of "objective facts." Here, again, personal values and biases of the observer will, of course, affect the answers. As a result, generally mixed responses are given, for it is possible to pick illustrations that both confirm and deny any general allegation that is made. On the whole, however—and that may be just a convenient way of escape—it must be conceded that Congress too frequently has been deficient in the performance of these aspects of its policy-forming job. Examples may be found in the Communications Act,[63] where language designed to regulate individual radio licensees provides only an indirect basis for control of networks and reflects no real recognition of the newer television medium; or in the Natural Gas Act,[64] where the intention of Congress regarding Federal Power

[60] Hyneman presents a realistic appraisal of the role of Congress. HYNEMAN, *op. cit. supra* note 7, at 77-202. See also Heady & Linenthal, *Congress and Administrative Regulation, supra* at 238, 253-60.

[61] TRUMAN, *op. cit. supra* note 2, at 321-94. *But see* ERNEST S. GRIFFITH, CONGRESS, ITS CONTEMPORARY ROLE vii (1961).

[62] Schwartz, *Legislative Control of Administrative Rules and Regulations: The American Experience*, 30 N.Y.U.L. REV. 1031 (1955); Cotter & Smith, *Administrative Accountability to Congress: The Concurrent Resolution*, 9 W. POL. Q. 955 (1956).

[63] 48 Stat. 1064, 1083 (1934), 47 U.S.C. § 307 (1958).

[64] 52 Stat. 821, 823 (1938), 15 U.S.C. § 717, 717d (1958). See discussion of this problem in CORNELIUS P. COTTER, GOVERNMENT AND PRIVATE ENTERPRISE 231-45 (1960).

Commission jurisdiction over producer sales to interstate pipelines is, at best, cloudy; or in the Transportation Act of 1920, where the standard governing railway rate-making by the Interstate Commerce Commission ("annual . . . fair return upon the aggregate value") was clearly inadequate to the task assigned.[65]

Yet a mild defense of the Congress must be offered, or at least a brief reminder given of factors that, to some extent, explain these deficiencies in regulatory statutes. In the first place, confusion or lack of clarity in regulatory goals and standards may be but a reflection of the magnitude and complexity of the problem to be solved or the industry to be regulated. The difficulty of reconciling the desire for "quality" television programs with the right of free speech, or of deciding the relative weight to be given to various criteria in assigning television channels, are illustrations.[66] Or confusion in statutes may result from uncertainty about methods to achieve ambiguous but nonetheless desired goals. Trade regulation to maintain a "free competitive enterprise system" is an appropriate example.[67]

Secondly, at times, complaints about lack of clarity in statutes are but indications of disagreement with regulatory goals and represent attempts to avoid forceful regulation. Or, as a variation of this point, complaints not infrequently reflect dissatisfaction with what is considered weakness in regulatory legislation. No small part of the criticism of regulation by independent commissions, it seems, is traceable to this factor.[68] There obviously are differences among men on the fundamental questions of what should be regulated and what should not, and concerning how forceful regulation, once initiated, should be. But it is well to remember that Americans, while not at all reluctant to use governmental power to achieve desired results, have generally eschewed the "comprehensive" approach toward regulation and have been content to proceed cautiously and on a piecemeal basis. There has been a willingness, to use the term of Professor Lindblom, to "muddle through."[69] Such an approach may not satisfy some of us, but it is essentially the one expected of Congress as it formulates regulatory policies. And Congress should not be condemned on grounds of lack of clarity in statutory policies when those policies *are* relatively clear, but not forceful enough to satisfy a given observer.

A fourth factor concerns the relationship between clarity of regulatory purpose and specificity of statutory provisions, between the need of sufficiently detailed directions by the Congress and the probably more compelling need of breadth and generality in statutory policy statements.[70] These relationships pose something

[65] 41 Stat. 456, 488 (1926). Cited and discussed in EMMETTE S. REDFORD, ADMINISTRATION OF NATIONAL ECONOMIC CONTROL 69-70 (1952).

[66] The free speech issue arises not only because of the constitutional guarantee, but also, and more immediately, because of § 326 of the Communications Act, which forbids the FCC to interfere with that freedom. 48 Stat. 1091 (1934), 47 U.S.C. § 326 (1958).

[67] Reference here, of course, is to such a statutory expression of "competitive enterprise" policy as § 5 of the Federal Trade Commission Act. 38 Stat. 717, 719 (1914), 15 U.S.C. § 45 (1958).

[68] Jaffe, *The Independent Agency—A New Scapegoat*, 65 YALE L.J. 1068 (1956).

[69] Lindblom, *The Science of "Muddling Through,"* 19 PUB. ADMIN. REV. 79 (1959).

[70] Redford provides a good discussion of these and related factors as they affect administrative program development. EMMETTE S. REDFORD, ADMINISTRATON OF NATIONAL ECONOMIC CONTROL 57-64 (1952).

of a dilemma for the Congress, as well as for the administrator. On the one hand, it is obvious that clarity in regulatory goals flows from specificity and detail in legislation. But on the other, too much detail can cripple imaginative and flexible administration of the law, especially in response to changing conditions. How then, for example, does the language of section five of the Federal Trade Commission Act, with its prohibition of "unfair methods of competition," measure up under each of these contending needs?[71] Such ambiguity in the definition of proscribed business practices may well be the price that must be paid for a sufficiently flexible adjustment of the law by administration to certain emerging business methods. Regardless of the conclusion in this or any other example, however, the point to be remembered is that congressmen and legislative draftsmen are not always oblivious of such considerations, and ordinarily attempt to reconcile in a reasonable manner these conflicting requirements.

Finally, the effect of the composition, organization, and leadership of Congress upon its policy-forming role should be recalled. The diverse and disintegrated character of the legislature is the source of much confusion and ineffectiveness in regulatory statutes. Diversity and independence of membership and organization place a premium upon compromise, and compromise can at times produce inconsistent, confused standards or goals in legislation. Interested outside parties, permitted "access" and "influence" by the organization and methods of Congress, are not averse to introducing confusion into regulatory laws.[72] Much or all of this is to be deplored, perhaps. But in evaluating Congress' responsibility in policy development, there is no harm in remembering what students in introductory courses in American government are rightly told—that the inconsistencies and confusions emanating from the national legislature are in no small way the result of the inconsistencies and confusions in the country at large.

B. Surveillance of Administration

It is also the responsibility of Congress to review the administration of laws it enacts. In performing this task, it inevitably attempts to influence or shape the content of regulatory policies. This is both a legitimate and necessary function of Congress, but one that is difficult of adequate performance and is easily abused. The methods and occasions of congressional review of regulatory policies are many and varied and well-known to all. Through its committees on appropriations, legislative and special investigating committees, as well as through individual congressmen, particularly, committee chairmen, and key staff personnel, Congress possesses innumerable agents of "legislative oversight" of regulatory policies. The quality and effectiveness of such oversight are uneven, however; and the resulting influence of Congress upon regulatory policies is, therefore, varied. In some instances, its influence produces administrative adherence to policies originally intended by Congress or assists in the legitimate and flexible adjustment of existing law to new

[71] 38 Stat. 719 (1914), 15 U.S.C. § 45 (1958).

[72] TRUMAN, *op. cit. supra* note 2, at 352-61. *But see* GRIFFITH, *op. cit. supra* note 61, at 151.

and unanticipated conditions.[73] On other occasions, however, its influence results in an enlarging or narrowing of statutory policies to accord with views of individual interests, congressmen, or committees.[74]

The character of Congress' influence, of course, is immediately determined by the interest, judgment, and wisdom of its reviewing agents, and by the resulting quality and intensity of the review.[75] Accordingly, the results are mixed.[76] For as would be expected among dozens of members and several committees directly concerned with regulatory policies, there is great variation in those factors that determine the quality of legislative oversight. In many cases, the approach to administration is guided by intelligence, understanding, and reserve. The competent members who are found on each committee, as well as experienced and resourceful staff personnel who assist them, provide vigorous, but balanced, surveillance of the development of particular regulatory programs. In a political system where power is divided and at times widely dispersed, responsible and effective government is achieved through the efforts of such men.

But not all conditions in Congress are so favorable for effective review. The very intensity and frequency of congressional oversight, which can be a basis of legitimate control of administration, may also disrupt and demoralize administrative efforts. Carried to an extreme, as it sometimes is, it can substitute congressional direction for the leadership and responsibility of agency officials.[77] Then too, the approach of congressional review is too frequently narrow and particularistic, concentrating upon a single problem or limited range of problems at a given time. Such an approach may be conducive to thoroughness of review, but it also makes difficult the achievement of broad understanding necessary to more balanced programs of government. Related to this condition is the practice of according to semi-independent units (committees, chairmen) authority to speak for the whole of Congress on policy matters. This practice, again, is productive of expertness on administrative programs and, on the whole, is an indispensable attribute of the national legislature. But it can also be the basis for usurping administrative authority in decision-making and for twisting statutory policies to accord with the particular interest of a powerful member or committee of Congress. And finally, there is weakness in legislative oversight in the noticeable failure of Congress to maintain sustained or reasonably continuous review of administrative policy development. Such failure, of course, is related in part to inadequacy

[73] Note the comments to this effect in the "panel discussion" type of hearings on the regulatory process held by the Subcommittee on Legislative Oversight in 1958. The panel was composed of administrative practitioners, agency members, and legal scholars, all of whom were concerned with the regulatory process. *Hearings, supra* note 15, at 102-05.

[74] James M. Landis cites, as an example, the role of the House Committee on Interstate and Foreign Commerce in "setting aside" the FCC's program for subscription television. *Id.* at 98.

[75] Attention should be called to the efforts made by Congress in 1946 to reorganize itself and improve its methods of operation, including its methods of surveillance of administration. See, in this regard, GEORGE B. GALLOWAY, CONGRESS AT THE CROSSROADS 230 (1946).

[76] See note 73 *supra.*

[77] See note 74 *supra.*

of time and personnel to undertake the difficult and ofttimes tedious jobs of review. But to some degree, it is also caused by the discontinuity in the sessions of Congress, changes in congressional composition and leadership, and the narrow political environment in which review is frequently undertaken.

SUMMARY AND CONCLUSION

President and Congress share responsibility for the regulatory process. Neither can claim exclusive interest or authority in the statutory formulation or subsequent administration of regulatory programs. The actual role of each and their relationship in the regulatory process is determined not in any permanently fixed or precise manner, but rather from time to time and from policy to policy by the movement of political forces and the realities of institutional characteristics that shape these branches of government. Within these relative limits, however, the functions of each are fairly clearly defined. In the case of the President, responsibility consists primarily of the formulation of policies for consideration of the Congress and the manipulation of political means for achieving their enactment into law. In this respect, the President, acting as the agent of reformist groups less effectively represented in the Congress, has achieved significant innovations in regulatory policy. His role in the development of administrative programs, however, is much less extensive, the independence of regulatory agencies and their use of a judicial, case-by-case approach for policy formation being the most apparent reasons.

Congress, through enactment of regulatory statutes, control of programs through appropriations, and surveillance of administration, exercises its share of responsibility for the regulatory process. The quality of its performance in these respects varies greatly, however, particularly because the dispersed nature of its leadership and political composition makes difficult the achievement of sustained and consistent attention to regulatory programs. The independent commissions, considered by legislators as "arms of the Congress," contribute materially to Congress' ability to involve itself in the minutia of administrative regulation, but also demonstrate its corresponding inability to provide the type of leadership that administration of complex programs requires.

There has been a noticeable failure of efforts to integrate the regulatory commissions into executive departments under control of the President. Such efforts, in addition to clarifying important issues concerning the unity of the regulatory process and of administrative fairness, reveal the underlying political relationships of participants in the regulatory process. Failure of executive integration, therefore, demonstrates the relative weakness of groups supporting greater authority in the President, as compared with opposing groups and interests with better political access to the Congress.

Because joint presidential-congressional responsibility for the regulatory process is a fact of American governmental life, it does not follow that the results for effective policy development are in all respects satisfactory. It does mean, however, that

attempts to remedy whatever inadequacies may be present will have to proceed, for the most part, in recognition of that fact of shared responsibility. The problem of achieving greater consistency and vigor in the administration of certain regulatory policies, and in their relations to other areas of governmental policy, is a case in point. No amount of wishful thinking or special pleading can remove the necessity of government's providing a better coordinated, more vigorous approach toward the problems of transportation in this country. Other observers find compelling need for similar improvements in the areas of communications, trade practices, and power resources regulation.[78] There are those, of course, who deny that such problems exist, or if acknowledging their existence, contend that Congress is capable of remedying them, by either improving the quality of its statutes or perfecting the character of its legislative surveillance, or both.[79] Conversely, others continue to find a solution in drastic proposals for executive integration, with consequent dismemberment of the independent agencies and distribution of their functions to executive departments and specialized administrative courts.[80] Neither of these solutions, however, will do: the former, because it provides no basis for the kind of direction that complex administration requires; the latter, since, at this juncture of our government's development, it is politically incapable of fulfillment, and also because it fails to provide an acceptable adjustment between the conflicting needs of a unified approach to individual regulatory programs and of procedural fairness.

It is, therefore, understandable—and appropriate—that other recent proposals for remedying the problems of coordination and planning have revealed more cautious and eclectic—and consequently, more realistic—approaches. The Landis and Redford reports are of this type.[81] For example, the Landis report, assuming the necessity and wisdom of retaining existing regulatory agencies, proposed the creation within the Executive Office of the President of special offices for the coordination and development of policies in the areas of transportation, energy, and communications. These offices ". . . would need no regulatory powers,"[82] but would serve as high-level staffs to the President for the study and development of policy recommendations in their respective fields, and as representatives of the President in contacts with the regulatory agencies and executive departments for the purpose of promoting cooperation and coordination in policy formation. Although there may be reason for questioning the ability of such offices to function as effectively as anticipated, particularly in view of their divorcement from administrative operations where the materials and staffs for adequate planning are found,

[78] LANDIS REPORT 24, 74; EMMETTE S. REDFORD, THE PRESIDENT AND THE REGULATORY COMMISSIONS 1, 6-8 (1960) (prepared by Professor Redford in his capacity of consultant to the President's Advisory Committee on Government Organization) [elsewhere cited as REDFORD REPORT].

[79] An early expression of this view is found in studies and reports prepared by The Brookings Institution in the late 1930's. See, BLACHLY & OATMAN, *op. cit. supra* note 33, at 168-82. A more recent example appears in the CAB memorandum on the Hector proposals, *supra* note 57, at 29-34.

[80] Hector, *supra* note 38, at 960-64.

[81] *Op. cit. supra* notes 17, 78.

[82] LANDIS REPORT 77.

the frankly empirical nature of the proposal has much to commend it.[83] Not only does it provide a more formal (although, perhaps, inadequate) means for presidential recognition of, and attention to, the needs of regulatory policy development, but, by minimizing opposition of Congress, and clientele groups through avoidance of drastic reorganization plans, it accomplishes that goal in the only manner that our political system currently allows. As a result, with adequate personal support of the President, the arrangement may enable immediate attention to be given to significant problems of regulatory policy formation, while, at the same time, experience is gained and a basis is developed for possibly more permanent and adequate organizational methods.

Similarly, the report of Professor Redford avoids the extreme reorganization proposals traditionally associated with executive integration and acknowledges the need of accommodating the requirements of better overhead policy direction in the President to existing operations in regulatory commissions.[84] In that way, it, too, seeks solutions to a serious issue now confronting the regulatory process, but in a manner that provides some possibility of success.

[83] *Id.* at 76-77.

[84] Note, for example, the following quotation from this report: "Some authorities have suggested that executive responsibility can only be safeguarded if the executive and policy-making functions of commissions are transferred to executive departments and their quasi-judicial functions placed in completely independent agencies. This solution is drastic and is based on the doubtful assumption that the regulatory scrambled egg can be cleanly separated into an executive-policy determining yellow and a quasi-judicial white. The same objective may be attained through providing the President with means through which he can give policy guidance to the commissions for their day-to-day activities." REDFORD REPORT 2. The necessary "means" of presidential leadership are set forth in *id.* at 3-5.

ISSUES AND ACCOMPLISHMENTS IN ADMINISTRATIVE REGULATION: SOME POLITICAL ASPECTS

WINSTON M. FICK*

A general critical examination of the issues and problems of administrative regulation by American government, set against the background of its goals and achievements, may be needed at present.

American experience with administrative regulation by government has been abundant and diverse, and has given rise to a very large and complex body of thought and discussion. But this has, in recent years, dealt mainly with spectacular public issues, such as the controversies over misconduct and inefficiency in the independent federal regulatory commissions, and with quite technical subjects, such as improvement of procedure, and with matters of specialized scholarship.[1] There are few current attempts at either of two tasks—that of giving a broad perspective view of the subject, and that of providing a general framework of ideas within which to grasp and appraise it as a whole.

These tasks are difficult ones. Their full accomplishment would require adequate foundations of at least four sorts.

One is analysis of the interactions between administrative regulation and the economic structures and economic dynamics of the sectors of the society that such regulation affects. A satisfactory general theory of administrative regulation—which is the ultimate goal—would have to be grounded upon understanding of these crucial determinants.

Another is appropriately arranged knowledge of the organization and workings of the programs and agencies of administrative regulation. A great deal of knowl-

* A.B. 1942, LL.B. 1950, University of California (Berkeley); Ph.D. 1958, Claremont Graduate School. Member of the California bar. Associate Professor of Government, Claremont Men's College and Claremont Graduate School, Associated Colleges at Claremont.

[1] Much recent discussion of the spectacular issues has centered around the activities of the Special Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce, now to be continued as a permanent Special Subcommittee on Regulatory Agencies. 1961 CONG. Q. WEEKLY R. 426 (Mar. 17, 1961). There have been numerous other congressional inquiries on technical matters of administrative organization and procedure, including an invaluable and unfortunately little used one, STAFF OF HOUSE COMM. ON GOVERNMENT OPERATIONS, 85TH CONG., 1ST SESS., SURVEY AND STUDY OF ADMINISTRATIVE ORGANIZATION, PROCEDURE, AND PRACTICE IN THE FEDERAL AGENCIES (Comm. Print 1957). The Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary is conducting a study of several of the various proposals for procedural reform. See its *Hearings on Administrative Procedure Legislation*, 86th Cong., 1st Sess. (1959), and its *Hearings on Federal Administrative Procedure*, 86th Cong., 2d Sess. (1960); see also its recent report, *Administrative Practice and Procedure*, S. REP. No. 168, 87th Cong. 1st Sess. (1961). There have been many law review articles on technical or specialized matters, and legal scholarship on administrative law has issued in a definitive treatise, KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE (1958). But political scientists have recently written comparatively little of general application about our subject. It is hoped that the paper will show that there is in the subject much that is of interest and significance for them.

edge exists (though, of course, we always would like more), but much of it not in forms and categories that make it readily usable for these purposes.[2]

A third lies in the realm of what may perhaps be called causative political analysis, in the study of the forces in the political order that affect administrative regulation.

A fourth is evaluation against normative political standards—against the values and criteria generated by systems of political beliefs.

The present paper is an attempt to make some preliminary contributions to the third of these foundations, to formulate views on political forces that act on the institutions and processes of administrative regulation.[3] A few opening observations may help orient our inquiry and clear the ground for it, since they embody ideas on which it is principally based.

First. A generally acceptable formal definition of administrative regulation would be hard to devise. But perhaps most would agree that we have administrative regulation when we have a regulatory scheme in which substantial discretionary authority, including authority to determine private rights and duties under the scheme, is given to administrative officials, and they have some authority to give their determinations legal effect but are required by law (and perhaps ultimately by constitutional principles) to act within a framework that reduces their freedom to less than that clustered immediately around the politically-responsible executive.[4]

Second. Administrative regulation, when viewed in these terms, is seen to be a very widespread phenomenon and a very much used tool of government. It is to be found in all manner of governmental entities, ranging in size from the largest undertakings recorded in the *United States Government Organization Manual* down to the smallest local planning commissions and beyond, and also ranging widely in form far beyond the agencies whose sole business is regulation. We have, therefore, a

[2] A great deal of it is found in the vast literatures on administrative law, on public administration, on issues of regulatory policy, and on specific agencies, programs, and regulated activities. These literatures are not generally oriented toward administrative regulation, per se and as a separate subject.

[3] In the present paper, "politics" and "political" are not meant to convey any undertone of disparagement (as "politician," say, often does), but rather merely to refer to the contentious and more dynamic aspects of government.

[4] This formulation deliberately leaves "regulation" undefined, and simply adopts the broad and shifting meaning of that term given by ordinary usage. (It, of course, covers much more than just regulation of industry.) A classic and influential work distinguished between "regulation by law," or "statutory regulation," in which substantially all the rules are laid down and the significant determinations are made by statute, with any nonlegislative interpretation and application being done largely by the courts, and "administrative regulation," wherein the statutory framework is less specific and officials are given powers to develop and apply it. JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES xi, 10 n.15, and c. 1 (1927). His example of administrative regulation is a statute of William and Mary directing the justices of the peace to fix rates for common carriers in their parishes. Another distinction often made is between administrative regulation of an industry and regulation by the market, or by statutes enforced directly by litigation without the intermediacy of administrative officials, such as parts of the antitrust laws. See, *e.g.*, GEORGE W. STOCKING & MYRON W. WATKINS, MONOPOLY AND FREE ENTERPRISE 520-29 (1951). Our formulation makes a distinction between administrative officialdom and the zone of true executive power and political responsibility; there are not only vital legal differences, but also differences in the institutions and in the forces involved that are exceedingly significant for the present inquiry.

very large subject to talk about. But it is also one whose defining characteristics give it a central core, common to all of its manifestations, to which analysis should be able to lead us.

Third. A key to such analysis is that these characteristics signal the presence of *political power* and *political tasks*.[5] Administrative regulation can be, in part, a technical or ministerial function. But because it has the discretionary official authority that it has, it is also always, in part, genuine government as well.

I

GENERAL FEATURES

Analysis can well begin with some general features of the background of administrative regulation and of its present condition.

Our first point is that administrative regulation in the United States has a large history, and broad and deep roots.

It is often dated from the era of the Granger movement, the Cullom Committee report,[6] and the establishment of the state railroad commissions and the Interstate Commerce Commission, at the earliest. And we often tend to think that it was of rather minor importance in government as a whole before the New Deal.

As has frequently been pointed out, both these views are inaccurate history.[7] The important point for the present inquiry, however, is that they can mislead by blinding us to the fact that the issues and problems, and the goals and achievements, of administrative regulation are very deeply embedded in long-established structures and processes of American government. So blinded, we tend not to look for the more basic causes and determinants in our subject, and to stop analysis with what may often be only transient phenomena of the current scene.

It is also common to see administrative regulation as, in the main, the work of the independent federal regulatory commission, and otherwise to conceive of it as rather narrow in scope.

The commissions probably do and have done only a rather small part of the total amount of administrative regulation done even by the federal government, and the periods of eclipse to which the commissions are subject have not by any means always been periods when administrative regulation as a whole declined drastically in

[5] The nature and use of the concept of power has been the subject of much scholarly controversy. The meaning herein is much the same as that of common usage, and includes authority and influence.

[6] Senate Select Comm. on Interstate Commerce, *Report upon the Subject of the Transportation of Freights and Passengers between the Several States by Railroad and Water Routes*, S. REP. No. 46, 49th Cong., 1st Sess. (1886).

[7] See, *e.g.*, Attorney General's Comm. on Administrative Procedure, *Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess., c. 1 (1941); LEONARD D. WHITE, THE FEDERALISTS (1948), THE JEFFERSONIANS (1951), THE JACKSONIANS (1954), and THE REPUBLICAN ERA, 1869-1901 (1958) for the federal level. Much of general background as to regulation of business is summarized in MERLE FAINSOD, LINCOLN GORDON & JOSEPH C. PALAMOUNTAIN, JR., GOVERNMENT AND THE AMERICAN ECONOMY *passim* (3d ed. 1959). See also the materials in LLOYD M. SHORT, THE DEVELOPMENT OF NATIONAL ADMINISTRATIVE ORGANIZATION IN THE UNITED STATES (1923).

scope or in vigor or in importance in government.[8] Wartime periods (especially, of course, that of World War II) have been periods of great expansion of administrative regulation and of far-reaching permanent developments and changes in it, yet are often almost omitted from discussions of it.[9] And finally, there has clearly been very extensive, diverse, and significant experience with it in state and local governments, but comparatively little of this experience has been made readily accessible or is considered in general writing and discussion.[10]

All in all, then, the impressions are strong that there are shadowed and neglected areas, outside the usual zone of attention, and that matters of importance for both the practice and the study of our subject lie in them.

Our second point moves to a more specific question. Is it possible to point to a time when influences, from history and elsewhere, seem to have come to some focus, to have produced the beginnings of the current era of administrative regulation, the present system?

Evidence on the question is largely impressionistic, and any answer must be conditional; perhaps seldom can the location of such divides in political affairs be established with cadastral positiveness. But in almost every strand of administrative regulation we trace back—structures, processes, subject, technique, ideologies, etc.—

[8] Measurements of the scope, volume, and importance of administrative action generally are notoriously slippery matters, see, *e.g.*, 1 DAVIS, *op. cit. supra* note 1, c. 1; and the difficulties do not decrease as one attempts to refine the measurements to types of administrative action, such as administrative regulation, and to extend them back in time; the problems of classification and of availability of data are both almost insoluble. Thus, the statistics of what would seem to be a natural source of recent federal data, the annual reports of the Office of Administrative Procedure of the Department of Justice, cover only proceedings in which opportunity is afforded for hearing before an Administrative Procedure Act § 11 examiner, see, *e.g.*, OFFICE OF ADMINISTRATIVE PROCEDURE, OFFICE OF LEGAL COUNSEL, U.S. DEP'T OF JUSTICE, THIRD ANN. REP. 10 (1959); and in the nature of things do not measure importance. The conclusions we state are, therefore, impressionistic, but they do seem to emerge quite clearly as one looks over the field.

[9] Histories, some official and some not, of various wartime agencies and programs have been published. Some efforts to apply wartime experience in drafting later statutes are recorded. *E.g.*, Field, *Economic Stabilization Under the Defense Production Act of 1950*, 64 HARV. L. REV. 1 (1950). Scholars have sometimes drawn on their individual experiences in government service in wartime. *E.g.*, CHARLES HYNEMAN, BUREAUCRACY IN A DEMOCRACY (1950). But it is not customary to take much explicit account otherwise of war periods and their effects. Indeed, lack of the historical sense is very widespread in thought on our subject, even though history has very greatly influenced the subject itself.

[10] There are a few standard studies, such as ROBERT M. BENJAMIN, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK (1942); JAMES W. FESLER, THE INDEPENDENCE OF STATE REGULATORY AGENCIES (1942); FERREL HEADY, ADMINISTRATIVE PROCEDURE LEGISLATION IN THE STATES (1952); and some other treatments of specific problems. There is a considerable literature on state administrative law. See, *e.g.*, the citations in DAVIS, *op. cit. supra* note 1. There is a very large literature on state government, of course, especially on state public administration; this contains much material on administrative regulation, but this material is largely buried in other categories and approaches and hence is little used in thought on the subject. There may, however, be an increasing current flow of special studies, written from the viewpoint of administrative regulation, of state agencies and programs. *E.g.*, Note, *The Regulation of Advertising*, 56 COLUM. L. REV. 1018 (1956); Note, *The Right to Equal Treatment: Administrative Enforcement of Antidiscrimination Legislation*, 74 HARV. L. REV. 526 (1961); Note, *State Administrative Practice: An Illustrative Survey of the Procedure of the Massachusetts Department of Public Utilities*, 67 HARV. L. REV. 845 (1954); and Note, *Pressures in the Process of Administrative Decision: A Study of Highway Location*, 108 U. PA. L. REV. 534 (1960). And occasionally one encounters a general formulation relevant to our subject that is based on state materials. *E.g.*, Boyer, *Policy Making by Government Agencies*, 4 MIDW. J. POL. SCI. 267 (1960).

some sharp touch of novelty, some significant new configuration, appears somewhere in the early New Deal days of the 1930's, even though there also are, at least as frequently, profound continuities across those years to the remoter past. With allowances for such continuities and for the difficulties of any division, our inquiry can emphasize the period that seems to have begun then.[11]

But even if the period *is* a period, an entity we can separate in meaningful ways from what went before, is it now about complete? Do we now have before us the more or less complete life histories and the mature, fully-developed forms of its phenomena?

This is a difficult question, but it is one that any general critical examination of administrative regulation encounters. A full answer based on any thorough review of all the evidence would be a vast undertaking, and perhaps an impossible one until we have a longer historical perspective. The following is merely a single observation, but it is one on what may be a central point. There seem to have been few really basic new ideas and approaches evolving in recent years in the established and generally accepted body of thought about either the practice of administrative regulation or its study. This is not at all to say that administrative regulation is stationary or declining in importance, scope, or number of uses. Indeed, it is probably rising in all these respects.[12] But as one follows discussion and the literature and at least the general aspects of the practice, one seems to encounter comparatively little that goes beyond the conceptual frameworks of five, ten, or even twenty years ago. Exceptions and embryonic new departures certainly exist, and some are mentioned later in this paper. And, of course, new periods of development and innovation lie in the future. But the period of creativeness that began in New Deal days appears now to have pretty much run its course.[13]

Our third point concerns one result of the events and controversies of this period. They seem to have brought quite substantial amounts of consensus into the general body of thought on administrative regulation.

In New Deal days, and for some time thereafter, this thought was dominated and deeply divided by extreme, rigidly held, and largely incompatible viewpoints, all maintained by warlike factions, each believing itself in possession of a nearly

[11] This conclusion, like those on the place of the independent regulatory commission, *supra* note 8 and accompanying text, is hard to document; and like them, it can only be offered as a strong impression.

[12] Here it seems possible to collect more concrete evidence than for the conclusions discussed *supra* note 8. Most regulatory agencies and programs seem to be expanding as fast or faster than government generally, and it is difficult to find many that have been abolished or much reduced since, say, the end of the Korean War. New ones keep appearing. See, *e.g.*, those to enforce antidiscrimination legislation, Note, *The Right to Equal Treatment: Administrative Enforcement of Antidiscrimination Legislation*, 74 HARV. L. REV. 526 (1961); and the recent developments in regulatory activities by the AEC in reactor licensing, and by the Food and Drug Administration under the Food Additives Amendment of 1958, 72 Stat. 784, 21 U.S.C. §§ 321, 342, 346, 348 (1958), and the Color Additives Amendments of 1960, 74 Stat. 397, 21 U.S.C.A. §§ 321 *et seq.* (Supp.). Examples could be multiplied by examining the legislative output of any recent session of Congress (and probably of most state legislatures).

[13] These points are discussed, and some evidence for them is offered, *infra* pts. II and IV.

absolute and nearly sufficient truth.[14] The extreme hopes and the extreme fears, however, have alike been disappointed. The more violent of the old polemics now seem dated.[15] The harsh outlines have softened. All views are not yet fully in harmony by any means, but they are much closer together now than they were in the old days.[16] There is now much more eclecticism and much more moderation and compromise. Theses and policies are now usually stated in less rigid and all-encompassing form.

Things are probably not ripe for the construction of a single grand general theory—if, indeed, they ever will be. But we do seem to see the strands of a chapter in the history of our subject drawing together into a synthesis and final statement, so that the formulation of a general critical view of it is possible.[17]

[14] Conservative, antireform, and anti-New Deal thought generated much intense opposition to all administrative action, including administrative regulation. For treatments of aspects of such thought for various periods, see THOMAS COCHRAN, THE AMERICAN BUSINESS SYSTEM (1957); JAMES W. PROTHRO, DOLLAR DECADE (1954); and FRANCIS X. SUTTON, SEYMOUR E. HARRIS, CARL KAYSEN & JAMES TOBIN, THE AMERICAN BUSINESS CREED (1956). For an analysis of the political theory of some major anti-New Deal viewpoints in the 1930's, see THOMAS P. JENKIN, REACTIONS OF MAJOR GROUPS TO POSITIVE GOVERNMENT IN THE UNITED STATES, 1930-1940 (1945). The core of the thought was, of course, a nearly absolute faith in unalloyed private enterprise. Legal formulations of it are found in abundance, especially in the American Bar Association publications of the period. Opposing viewpoints included those that clustered around an almost equally absolute faith in government planning and broadly discretionary government power as the cures for the social ills of the time, those based on various doctrinaire reform movements, and those of the public administration movement, which is discussed briefly in the next part of this paper.

[15] *E.g.*, JAMES BECK, OUR WONDERLAND OF BUREAUCRACY (1932). And few, even among the new conservatives, would now urge that the following 1943 statement by Herbert Hoover embodies a tenable theory of government: "When Governments exert regulation of economic life, they must do so by definite statutory rules of conduct imposed by legislative bodies that all men may read as they run and in which they may at all times have the protection of the courts." Quoted in Leventhal, Book Review, 68 YALE L.J. 614 (1959). Similarly, the extreme arguments for planning and the extreme claims for what could be achieved by free administrative action would find little support now even among unreconstructed New Dealers. See also the bitter controversy over the Administrative Procedure Act of 1946, 60 Stat. 237, 5 U.S.C. §§ 1001-11 (1958), and over the various legislative events that led up to its enactment. This was perhaps one of the last full confrontations of the various extreme viewpoints before moderation set in. The Act was rather limited in purpose and effect. See, *e.g.*, Parker, *The Administrative Procedure Act: A Study in Over-Estimation*, 60 YALE L.J. 581 (1951). Yet, some of the criticisms of it, *e.g.*, Blachly & Oatman, *Sabotage of the Administrative Process*, 6 PUB. ADMIN. REV. 213 (1946), were quite intemperate, as were also many of the arguments for it.

[16] There is still a good deal of suspicion among advocates of the administrative process of proposals that are deemed likely to constrain or formalize that process. See the criticisms of the American Bar Association's proposed Code of Federal Administrative Procedure in Heady, *The New Reform Movement in Regulatory Administration*, 19 PUB. ADMIN. REV. 89 (1959). The Code was generally received with, at best, great reserve and more often with unbridled hostility by the federal departments and agencies, as reflected in their comments on it filed with the Senate Judiciary Committee in 1959-60, when it was introduced as proposed legislation, S. 1070, 86th Cong. 1st Sess. (1959). Actually, the Code is a rather moderate proposal. See, in this connection, the comments on Professor Heady's views in Rosenblum, *Public Administration and Public Law: Mutual Perspectives in Regulatory Agencies*, a paper delivered at the 1959 convention of the American Political Science Association. And the agency criticisms are largely unfounded. See LEO A. HUARD, REX A. COLLINGS, JR. & WINSTON M. FICK, A STUDY OF AGENCY COMMENTS ON THE PROPOSED CODE OF ADMINISTRATIVE PROCEDURE (1961), a study prepared for the ABA's special committee on the Code. Yet, at one time, the ABA was a center of extreme opposition to the whole administrative process; the change in its viewpoint is a striking illustration of the new state of affairs.

[17] Though any such undertaking inevitably involves some drastic simplifications as well as a great deal of selection.

II

SOME IDEOLOGICAL ELEMENTS

An examination of the goals, achievements, issues, and problems of administrative regulation is inevitably an examination, at numerous levels, of what we may loosely term its ideological elements—the ideas, values, concepts, views of government and society, and the like on which it is based. These determine the goals, direct the achievements, and define the issues and problems, within the broad limits set by social and technological conditions and by the general framework of the political order.

Thorough examination of these ideological elements would require virtually a complete intellectual history of thirty years of the practice of American government. Mention is made here only of a few, chosen almost arbitrarily from the many that now appear to have been especially important.

No one list of such elements would ever command universal agreement, but the following would probably appear on most lists: (1) a strong and pervasive faith—albeit a faith that has faded somewhat in recent years—in "expertise," in the existence of *the* solutions to public problems and the discoverability of these solutions through the application of special knowledge and skills;[18] (2) a challenge, under the banners of sociorealist juristic theory, to some of the established views of the nature of law and of the judicial function;[19] (3) the doctrines of the public administration movement and the ideas behind those doctrines; and (4) a thread woven through almost the whole fabric of thought, and exceedingly difficult to grasp and appraise, which perhaps can best be labeled as the concept of "the administrative process."

The latter two of these particularly require some comment here.

At least by middle New Deal days, the public administration movement[20] had become established as a major influence in government. This occurred partly because the movement had built up a record of substantial accomplishments, partly because its theses were appealing in the circumstances and its spokesmen were devoted and effective advocates, and partly because it was one of the few move-

[18] This was naturally a doctrine of the public administration movement, but it was also much more widely held. See, *e.g.*, the article, *Expert* in 6 ENCYC. SOC. SCI. 10 (1931), for some hints of this.

[19] "Sociorealist" is used as a broad (and, of course, loose and somewhat imprecise) term to refer to the areas of agreement of legal realism, sociological jurisprudence, and related schools, and to contrast these with the then-traditional analytic, "mechanical," positivistic jurisprudence. With individual exceptions, exponents of the former tended to be ranged on the side of "the administrative process" and to be relied upon by its advocates, whereas the latter was the doctrine of its opponents. An analysis of the juristic theory of one of the most influential and typical pro-administrative books of the period, JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS (1938), is Chroust, *Law and the Administrative Process: An Epistemological Approach to Jurisprudence*, 58 HARV. L. REV. 573 (1945).

[20] Any description of the movement and its thought would certainly include references to two of its basic texts, LEONARD D. WHITE, INTRODUCTION TO THE STUDY OF ADMINISTRATION (1926), and LUTHER GULICK & LYNDALL URWICK (EDS.), PAPERS ON THE SCIENCE OF ADMINISTRATION (1937). The leading historian of the thought of the movement is Professor Dwight Waldo. See DWIGHT WALDO, THE ADMINISTRATIVE STATE (1948), THE STUDY OF PUBLIC ADMINISTRATION (1955), *Development of Theory of Democratic Administration*, 46 AM. POL. SCI. REV. 81 (1952), *Administrative Theory in the United States*, 2 POL. STUDIES 70 (1954), and PERSPECTIVES ON ADMINISTRATION (1956).

ments on the scene that offered a program and technique for constructing and operating the big government that the political situation was producing. Professor Waldo has shown, in a classic study, that the movement propounded, explicitly or by implication, answers to several of the great problems of political philosophy.[21] At least three of these are crucial in administrative regulation, and the influence that parts of the movement's answers had on it was substantial.

To the question, What is the good society?, the movement answered (in part): One in which environment has been fully mastered for man by extensions of scientific method, in which planning rationally apportions the society's available means among chosen ends, in which the choice of ends is by public mechanisms and standards rather than *laissez faire,* and in which individualism, materialism, and egalitarianism are strong.

To the question, What should be the criteria, the bases, for decision and action on public matters?, the movement offered a compound from utilitarianism, positivism, and pragmatism.

To the question, Who should rule?, the movement returned an answer made somewhat ambiguous and incomplete by obscurities in its idea of a general expertise in government and by some hesitation to think the matter through, but an answer that granted the administrator a large claim upon the exercise of political power.

Add to these the movement's very great influence on more specific and lower-level matters, such as organization, management, and technique,[22] and we have a substantial part of the ideological structure of our subject not only in its New Deal days, but long after.[23]

The phrase "the administrative process" was apparently established in general use by Dean Landis's famous book and by the report of the Attorney General's Committee on Administrative Procedure.[24] A group of similar phrases developed: the legislative process, the regulatory process, the political process, the decision-making process, etc. The common parent probably was "the process of government," used by A. F. Bentley.[25] All revolve around the central concept of a series

[21] DWIGHT WALDO, THE ADMINISTRATIVE STATE (1948). "Political philosophy" is perhaps most accurately regarded as the part of a political theory devoted to a general philosophical rationale of moral foundations, to questions of "ought." THOMAS P. JENKIN, THE STUDY OF POLITICAL THEORY 6-11 (1955). But as Professor Waldo shows (and as HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR (1947), has emphasized), the "is" and the "ought" have been much intertwined in thought about public administration.

[22] That is to say, its influence was felt not only through its ideas on the grand issues of political ideals and its contributions to its own special field of asserted competence, the actual mechanics of government, but in between, in the middle range, through, for example, its emphasis on "economy and efficiency," on rationalized (and mainly hierarchical) organizational structures, and on its idea that "administration is a single process, substantially uniform in its essential characteristics wherever observed," LEONARD D. WHITE, INTRODUCTION TO THE STUDY OF ADMINISTRATION *preface* (1926); and through its devotion to what it took to be scientific method and hard facts.

[23] Indeed, long after the movement itself had abandoned or modified many of its own views.

[24] LANDIS, *op. cit. supra* note 19; Attorney General's Comm. on Administrative Procedure, *supra* note 7, c. I, "The Origins, Development, and Characteristics of the Administrative Process."

[25] ARTHUR F. BENTLEY, THE PROCESS OF GOVERNMENT (1908). Bentley was highly regarded in the 1920's and 1930's by the influential "Chicago school" of political scientists and those close to it, long before his recent revival. BERNARD CRICK, THE AMERICAN SCIENCE OF POLITICS c. 7 (1959).

of continuing functional interrelationships and interactions.[26]

As a tool or weapon in the hands of practitioners, and as an analytic device in the hands of students, of administrative regulation, the concept in all its various formulations released much new energy in many new directions. In particular, it seems, as we look back, to have been intimately connected with the stunning dynamism that characterized so much of our subject in the midpart of the period.[27]

Its importance arose, in part, from the fact that it points toward a central characteristic of government, continuousness and interrelatedness flowing across the lines of governmental institutions and structures and of legal-constitutional categories. This characteristic is peculiarly significant for administrative regulation, and it is one that the advocates of the concept believed to be both the channel of the energizing forces that make the institutions and structures work and also the reality that underlies the categories.[28]

Another basis for the concept's importance is a matter of personalities; it became one cornerstone of the doctrine of a host of energetic and imaginative new practitioners and students who were then rising to power. To them, it was one key to escape from the traditional arrangements and methods with which they were dissatisfied, and they used it to the full.

The concept and the associated characteristic of government have another dimension of meaning for the present inquiry besides the help they give in elucidating the intellectual history of our subject. One of the principal achievements of American administrative regulation has lain in the rather high degree to which it has made itself responsive to this characteristic, to continuousness and interrelatedness across organizational and categorical lines; indeed, such responsiveness is close to the heart of the ideal and the tradition of performance that have flowed from the Landis book. And one of the basic and continuing groups of problems is that of what is the proper extent and the proper forms of such responsiveness in particular situations. This question lies behind numerous current concerns about administrative regulation, such as those about "judicialization," agency independence, policy development, relations with regulated interests, and the like.[29]

Moving now to the present scene, can we discern any movements in contemporary thought that are now providing, or are likely soon to provide, significant new ideological elements for either the practice or the study of administrative regu-

[26] A brief discussion that has the tone of the advanced and sophisticated sectors of the thought of the time is Fainsod, *Some Reflections on the Nature of the Regulatory Process*, in CARL J. FRIEDRICH & EDWARD S. MASON (EDS.), PUBLIC POLICY 297 (1940).

[27] As one rereads the records of the time, one is struck by how often the phrases appear. The concept seems to have been almost constantly in the minds, sometimes explicitly and sometimes unrecognized, of the men who were leading all the innumerable new ventures in government.

[28] Thus, the reality was seen as a seamless web (if one may misapply that famous phrase), and it was felt that the rigid divisions were mistaken deductions from the doctrine of separation of powers and from the legal-structural approach.

[29] For example, judicialization tends to reduce responsiveness generally, and independence tends to reduce it as to forces flowing through the Presidency but (usually) to increase it as to forces flowing through Congress.

lation? Obviously, this question also is extraordinarily broad, and any answer can only be a limited and partial one, but a comment or two must be hazarded.

We have already suggested that established present-day thought in our subject does not seem to be very imaginative or creative; indeed, even the leading reform proposals go little beyond the conceptual framework of, say, the report of the Attorney General's Committee of 1941.[30] Elsewhere, however, there are movements in thought that have some strikingly novel things to say. These are not limited to academic scholarship, but they are concentrated there. Although they are already exercising considerable influence on the practice of government in other fields, they have so far barely touched administrative regulation as such. But there has always been much exchange between academic scholarship and the practice of administrative regulation, and no doubt there will be much in the future.

One group of such movements may be selected for brief description and comment.[31] It is the group associated with what may be called, as a rough catch-all designation, modernism in the social sciences, and in particular with what is usually denominated "the political-behavior approach" to the understanding of government and politics.

The political-behavior approach has been authoritatively described as having four distinguishing characteristics, among others. (1) It takes as its unit of study the behavior of persons and groups, not events, institutions, or ideas. (2) It is close to the behavioral sciences, notably psychology and sociology. (3) It emphasizes the interdependence of theory and empirical research, seeking both to formulate theoretical questions to guide research and be tested by research and also to apply research results explicitly to the development of theory. (4) It is interested in precisely formulated research hypotheses and in rigidly empirical verifications, by observation almost always and by measurement whenever possible. In each of these, one sees possibilities of valuable new tools for practitioners and students of our subject alike. Furthermore, some such possibilities have already been realized.[32]

A great deal is known about the events, institutions, and ideas of administrative regulation. About the actual behavior of the actual people who regulate and are regulated much less is known, and most of that is intuitive and unsystematic, based upon practical experience rather than explicit study, and hence not readily communicable. The student or administrator of any regulatory agency probably could use much more of the sorts of information the new approach can supply, such as: what are the actual channels of effective communication within the

[30] That is to say, they tend to talk the same language and think in terms of the same ideas, even though the problems they see, and their specific views and conclusions, often differ widely from those of the Committee.

[31] There are numerous others, such as (1) the case studies of administrative processes being done for the Inter-University Case Program and by a research group headed by Professor Marver H. Bernstein of Princeton; (2) the new work by economists in industry studies and in the effects of regulation; and (3) the very rapid developments in the study of organization and of administration.

[32] The description is paraphrased from HEINZ EULAU, SAMUEL J. ELDERSVELD & MORRIS JANOWITZ (EDS.), POLITICAL BEHAVIOR 3-4 (1956). This book is usually regarded as a basic text, and a leading programmatic statement, for the approach.

agency; what would be an accurate cross-sectional picture of contacts between the regulated and agency personnel; and what are the informal organizations within the agency, and what functions do they perform. Questions could be multiplied, and each answer would add some new dimensions to what can be learned by orthodox methods of inquiry.[33]

Attitudes, values, images, roles, and other components of human relationships and motivations surely affect decisively the actions of people involved in administrative regulation. Exploration of these with the techniques of psychology and sociology can shed much light. For example, something is now known about the sociopsychological conditions of effective regulation of businessmen.[34]

The commitments of the political-behavior approach to close and reciprocal interactions between theory and empirical research, and to more nearly scientific standards and techniques of verification, present more difficult problems. On the one hand, most people interested in administrative regulation would agree on the desirability of these in general and on many specific situations in practice and study where they would be exceedingly relevant. However, there would be doubts whether the material of our subject would lend itself to them and whether the typical political-behavior research design can be sufficiently broad to encompass a meaningful question about the regulatory process. But perhaps the overriding fact is that there can be little doubt of the value of the approach's theory-research and methodology-verification views for shaking up established thought, pushing it toward new insights, and making it ask new questions and see new dimensions.[35]

III

THE PLACE OF ADMINISTRATIVE REGULATION IN GOVERNMENT

We now turn to one of the most important general questions about administrative regulation, and one that was the subject of very stormy controversy during much of the period we are considering: What is its place with respect to the great agencies of government—the legislature, the executive, and the courts?[36]

This question is only partly answered by facts about magnitudes and functions—how much, and what, administrative regulation has done—and by discussion of the constitutional considerations involved. Knowledge is also needed about the causes that have determined the structural and functional relationships. Looking back on the American experience in our period in the light of modern thought, it seems

[33] This is not to say that the orthodox methods do not develop information on behavior, but merely that the explicitly behavior-oriented methods would often develop more, and from different angles.

[34] ROBERT E. LANE, THE REGULATION OF BUSINESSMEN (1954).

[35] Surely one of the best actual examples of this is the effect the approach has had on public administration.

[36] Putting the question in this form asserts that the classic separation-of-powers categories are significant ones and, further, that there is a real division between the administrative and the executive proper. These two hypotheses are defended, by implication, in what follows.

possible to make some broad statements on these relationships and their causes with considerable confidence. A few such are now offered and briefly discussed.[37]

1. At the heart of the whole matter lie the tensions permanently present in American government because of the doctrine of, and constitutional arrangements for, separation of powers. This is commonly recognized, but a crucial implication often is not. The tensions, permanently present, are also constantly working and changing, in an unending process of interaction and transformation, and are never still. Assertions about the nature and characteristics of the place of administrative regulation must, therefore, take careful account of this process. The structural and functional relationships between administrative regulation and the other parts of government are largely created and continuously remoulded by, and are principal battlegrounds for, the profoundly political forces of the great struggles for power.[38] Thus, when a conflict occurs over removal of a Federal Trade Commissioner,[39] or over "legislative oversight,"[40] or over "executive leadership," or over "judicial supremacy," or over judicial review of administrative action in which the President has participated, or over most of the innumerable other issues or relationships, we are, in substantial part, simply seeing a permanent element in our constitutional and political system operating.[41]

2. Intertwined with these tensions, deep in the foundations of administrative regulation, and perhaps rivaling these in importance, are the consequences of another fact: administrative regulation is government in small. A cross-section of almost the totality of the tasks and incidents of governments and politics is created (or assembled) when an agency or program of administrative regulation is established; it is a political enterprise with political goals, as well as a piece of technical and bureaucratic machinery.[42]

[37] For convenience, they are put as a series of numbered propositions. However, it is not claimed that these propositions form, or are based on, a complete theory. Nor are they intended to involve more than the most minimal assertions about what the proper place of administrative regulation should be.

[38] On this, as on so many aspects of American government, the *Federalist* continues to be profoundly enlightening. See, *e.g.*, Nos. 10, 47-49, and 51.

[39] Humphrey's Executor v. United States, 295 U.S. 602 (1935). And see Weiner v. United States, 357 U.S. 349 (1958); and congressional reaction to President Kennedy's Feb. 7, 1961, letter asking for reports from the commissions. 107 CONG. REC. 3686-88 (daily ed. Mar. 14, 1961).

[40] The phrase originated in the heading to § 136 of the Legislative Reorganization Act of 1946, which directs each standing committee of Congress to "exercise continuous watchfulness of the execution by the administrative agencies concerned of any laws, the subject matter of which is within the jurisdiction of such committee. . . ." 60 Stat. 832, 2 U.S.C. § 190d (1958); *cf.* H.R. Rule XI-27 (1959). The Constitution directs that the President "shall take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3.

[41] See, *e.g.*, Hochman, *Judicial Review of Administrative Processes in Which the President Participates*, 74 HARV. L. REV. 684 (1961).

[42] Thus, Professor E. Pendleton Herring, in PUBLIC ADMINISTRATION AND THE PUBLIC INTEREST 6-16 (1936), had already remarked on how parts of the legislative and political task of reconciliation have been, and have had to be, shifted to the administrative. Groups subject to agency regulation generally see its political aspects very clearly, but there seems to have been a certain hesitation about studying the agencies in a thoroughly political light; perhaps this was a consequence of the now-discarded view that there is a basic difference between politics and policy-making and administration. See, on this, DWIGHT WALDO, THE ADMINISTRATIVE STATE c. 7 (1948).

Many of the characteristics of administrative regulation, including many of its achievements and certainly a very fair share of its issues and problems, arise from this fact and from the further fact that it typically has few of the institutions and traditions of politics to help it. Politics involves struggles over political power with political weapons—popular support, pressure, polemics, and the like; it involves negotiation, reconciliation, compromise, the generating of consensus; it involves the resolution of some of the keenest and most serious conflicts a society produces. Normally, this goes on in a broad setting, and through a complex of large and explicitly political institutions and traditions: legislatures, campaigns, parties, elections, deals, etc. In a typical system of administrative regulation, however, it goes on in a microcosm, under distorting restrictions, centered around a government office that purports to be a chaste bureaucracy like any other, and with hardly any recognized and approved political (or even quasi-political) devices available to ensure that it will have light, air, and structure and will work efficiently and in accordance with the society's accepted rules for conduct of the political struggle.[43]

It is, therefore, not surprising that there have been half-explicit and half-recognized tendencies, scattered throughout our period and embodied in many specific instances, for some such devices to develop—for example, for administrative rule-making to acquire some of the give-and-take openness of the legislative process, and administrative adjudication some of the insulation of the judicial, and for agency commissioners to function through their political rather than their technical abilities. Nor is it surprising that activities around regulatory agencies and programs have so frequently burst their bounds and appeared as full-fledged political wrangles in the legislature; this is inevitable and natural, is not an accident, and is still less an anomaly or distortion.[44]

3. Congressional power over, and participation in, administrative regulation has turned out to be, in substantial measure, (a) constitutionally sound, (b) a product of some of the basic facts of our political order, and (c) inevitable.

Relations between Congress and the administrative were debated, and sometimes fought over very bitterly, almost continuously during our period. The assertion was heard frequently from congressional quarters that not only is there virtually nothing in any administrative or executive activity, excepting a few specific personal functions of the President, that is immune from congressional examination, but also there is virtually no administrative action that Congress or its committees cannot control—indeed, could not do themselves if they had a mind to.[45] Opposite ex-

[43] Many of the devices exist and are, of course, used, but not officially, and they are usually under some degree of cloud.

[44] Proposals for reform of the administrative process now seem more and more to be recognizing all of this.

[45] This is still a favorite theme of congressmen questioning regulatory officials. See, *e.g.*, the panels held by the Special Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce in its *Hearings on Administrative Process and Ethical Questions*, 85th Cong., 2d Sess. (1958), and *Hearings on Major Administrative Process Problems*, 86th Cong., 1st Sess. (1959).

tremes were urged by spokesmen for the administrative viewpoint.[46] This warfare along the marches will no doubt go on as long as the governmental system retains its vitality, but the experience of the last twenty-odd years suggests at least a few conclusions about some fundamental aspects of the matter.

Both in constitutional doctrine and also in the actual functioning of the constitutional order, with which we are here more directly concerned, quite extensive congressional power and participation seem sound, in the sense of being workable and consistent with the nature of the structures and processes involved.[47]

Experience also seems to have made it clear that the causes of congressional participation and the sources of congressional power lie in some measure in basic political facts. Congress is the channel through which important portions of the energies of popular sovereignty and representative government flow, and it is the instrument by which (and the arena in which) there is determined most public policy lying in the middle range between the very general and the very specific. It is, therefore, pushed from many quarters into intervention in administrative regulation and is equipped with the political power to intervene effectively. And a vital category of specific forces works in the same direction; operation through Congress is a natural recourse for interest groups striving either to get their way with reluctant regulators or to assist and support favorable regulators.[48] With these and many other forces almost constantly in operation, and with few major counterforces, it seems safe to speak of such intervention as inevitable.[49]

4. On the other hand, numerous congressional efforts at participation or control, falling into several fairly definable classes, have not been successful. Some of the causes of this have also to a considerable extent emerged, and it now seems possible to say that limits on the congressional power do exist, and even to describe them a little—matters of much importance to a general view of administrative regulation.[50]

First, consider situations where there has been serious agency resistance. Congressional attempts at participation and control have on numerous occasions run into grave difficulties when met with such resistance. There have, for example, been a number of instances in which congressional groups have been unable to get data from agencies or full access to their internal affairs, unable to compel some agency

[46] Largely as a part of the disillusionment with Congress, and the trust in presidential leadership, so widely felt in the 1930's. Congressional handling of the tariff is an example of the causes of this disillusionment. See ELMER E. SCHATTSCHNEIDER, POLITICS, PRESSURES, AND THE TARIFF (1935).

[47] A thoroughgoing defense of this view, based on acute political analysis, is Newman & Keaton, *Congress and the Faithful Execution of the Laws—Should Legislators Supervise Administrators?*, 41 CALIF. L. REV. 565 (1953), although, as these authors, of course, point out (and demonstrate in their remarkable collection of facts and authorities), there are limits.

[48] Examples are innumerable. Indeed, the existence and importance of almost continuous reciprocal interactions among legislature, administrative, and interest groups is now a truism in the study of government.

[49] It is, in fact, difficult to point to specific agencies or programs in which such interventions and the consequent further interactions do not appear to be going on, to some degree, almost all the time.

[50] Especially for one that seeks to approach the matter from the standpoint of politics and power. The general subject is discussed, and some material collected, in ROLAND YOUNG, THE AMERICAN CONGRESS cc. 7-10 (1958), and, from varying points of view, in most other studies of Congress.

actions, and unable to change agency policies or prevent these from being carried out.[51]

Sometimes the reasons for such outcomes have been adventitious; participants on the congressional side have lost interest or have decided it would be undesirable to press matters, the White House has intervened, etc. But sometimes they have emerged from basic characteristics of the relationship. Sometimes, for example, the information necessary for effective congressional action has been too voluminous, or too complex, or too specialized and abstruse to be collected, grasped, and used by Congress and its agents. Sometimes congressional organization has been inadequate to deal with an administrative bureaucracy. And sometimes the agency, or its supporting interest groups, was able to generate adequate defensive political pressure.[52]

There have, of course, been many instances in which Congress has had its way; indeed, this is the typical situation, as we would expect it to be.[53] But one is struck by the fact that there do seem to be quite deep-seated forces that create substantial areas of agency freedom and give the agency effective defensive weapons.

Further, even in legislative-agency relationships not characterized by active administrative resistance to congressional hegemony, there seem to be strong forces that work against really close linkages. Few agencies have ever really been "arms of Congress" for long. But the mysterious subsurface dynamics of the governmental system that make this so have not yet been fully clarified.[54]

5. Relationships between administrative regulation and the courts appear today to have settled into a rather clear and stable pattern. The extreme view urged in the 1930's (though perhaps as often as a device of polemics as a serious thesis), that administrative regulation must be brought fully under judicial control—and, indeed, that substantial parts of its tasks must actually be done by the courts—now seems to have been without much foundation; and in recent years, the most commonly heard proposals in this field are the comparatively modest ones that specialized courts take over some kinds of regulatory adjudication and that judicial review be strengthened and enlarged.[55] And on the other hand, the contrary extreme view, that the

[51] The histories of most agencies, independent and not, yield such examples. The CAB, an independent agency that enjoys generally excellent relations with Congress is probably typical. The CAB quite successfully resisted the efforts of the Senate Select Committee on Small Business to get it to change its policy toward the nonscheduled airlines; part of this story is told in the committee's various reports 1951-55. *E.g.*, Senate Select Comm. on Small Business, *Annual Report*, S. REP. No. 1092, 83rd Cong. 2d Sess. (1954).

[52] Again, most agencies' histories yield examples.

[53] Since the constitutional powers of Congress are so overwhelming, and the amount of energy it generates is so vast.

[54] A typical example of the "arm of Congress" thesis is found in Evins, *Federal Regulatory Commissions—Arms of Congress*, 24 ICC PRAC. J. 699 (1957), and in Congressman Evins's remarks in 103 CONG. REC. 4056 (1957).

[55] There is much in print on the proposals for specialized courts. For surveys and representative viewpoints, see, *e.g.*, Berger, *Removal of Judicial Functions From Federal Trade Commission to a Trade Court: A Reply to Mr. Kintner*, 59 MICH. L. REV. 199 (1960); Carrow, *Administrative Adjudication: Should Its Role be Changed?*, 27 GEO. WASH. L. REV. 279 (1959); Davison, *An Administrative Court of the United States*, 24 GEO. WASH. L. REV. 613 (1956); Gribbon, *Should the Judicial Character of the Tax Court be Recognized?*, *id.* at 619; Freer, *The Case Against the Trade Regulation Section of the*

regulatory process requires virtually complete freedom from judicial intervention, has been disproven.[56]

The scope of judicial review proper has become rather strikingly limited in doctrine and even more limited in practice.[57] Its most prominent function has emerged as that of policing administrative procedure.[58] As a device for insuring rationality in administrative determinations, settling problems of agency jurisdiction, and clarifying statutory mandates and policies—functions in which it might well be expected to render vital service—it has been of less importance.[59]

6. In contrast to the comparatively clear and simple picture presented by the relationships between administrative regulation and the courts stands that presented by relationships between administrative regulation and the Presidency.[60] The experience of the last twenty-odd years strongly suggests that this is the most complex, most changeable, and least understood aspect of the place of administrative regulation among the agencies of government.[61] About all we can say with real confidence, by way of generalization, is that full integration of regulatory agencies and programs under the presidential hand has proven as illusory a goal and need as has full independence for them, and that by the very nature of the Presidency, no single set of

Proposed Administrative Court, id. at 637; Farmer, *An Administrative Labor Court: Some Observations on the Hoover Commission Report, id.* at 656. Proposals to strengthen or enlarge judicial review usually do not aim at increasing the scope of review of the evidence beyond substituting the "clearly erroneous" rule for the current "substantial evidence" rule—if, in truth, this would be a very large increase in scope. 4 DAVIS, *op. cit. supra* note 1, c. 29. Rather, they more often seek to cut down the areas of unreviewability, or to give the reviewing court a freer hand in interpreting the law, or to make interim judicial relief more available. See *Hearings, supra* note 1.

[56] This is, of course, in very substantial part because the extremely antagonistic and obstructive attitudes held by some courts in the 1930's toward all regulation, and especially toward administrative regulation for social reform, have collapsed.

[57] Nonspecialists in administrative law are often surprised by how much administrative action is, or can be, made unreviewable under current law and constitutional doctrine, see 4 DAVIS, *op. cit. supra* note 1, c. 28; and by how much respect the courts give to administrative judgment. *E.g.*, Moog Industries, Inc. v. FTC, 355 U.S. 411 (1958). Specialists quite generally agree that courts, especially those familiar with the field, often are disinclined to exercise their powers, particularly in cases involving agencies that have their confidence.

[58] This is obviously a very sweeping and dangerous generalization. (And how does one measure "prominence," anyway?) But it does seem to emerge, as one traces developments of the past twenty-odd years.

[59] As to insuring rationality: (1) There is reason to believe that informal procedures are not only immensely important, 1 DAVIS, *op. cit. supra* note 1, cc. 1 and 4; but are increasing in importance, Woll, *The Development of Shortened Procedure in American Administrative Law*, 45 CORNELL L.Q. 56 (1959); as is regulation by advice and comment. These tend to put agency determinations beyond the reach of judicial review. (2) Agencies very frequently conceal the bases of their determinations in formal proceedings within loose, all-embracing findings that cover without revealing or defining, and hence cannot be effectively reviewed. Similar showings could be made as to jurisdictional problems and as to clarification of statutory mandates and policies.

[60] A sharp distinction has often been made between the relationships of the Presidency with the independent commissions and those with the agencies in the executive branch proper. But as we study the matter further, the distinction seems less and less clear. It is not formal, legal, independent status that divorces agencies from effective presidential control. Here, as in so many instances, the underlying political processes and relationships are vital.

[61] Evidence for this is scattered all through the standard text on the Presidency, EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS (4th ed. 1957), and the many accounts of the Roosevelt Administration.

organizational arrangements can contain its relationships with the administrative and define the "place" of administrative regulation.[62]

IV

ADMINISTRATIVE REGULATION IN OPERATION[63]

We have offered in the preceding part of this paper some general statements on the place of administrative regulation in government generally—that is to say, on the nature and causes of its relationships with the rest of government.[64] We now move closer, and try to do the same for its actual operations.[65]

1. Professor Jaffe has suggested[66] that there are basic factors inherent in American industrial organization, concepts of regulation, and political machinery that limit substantially the capacity of administrative regulation to exercise the powers of planning and management over industry that its advocates have urged for it.[67] Some of his theses are particularly relevant to our inquiry, since if they are correct—and the evidence for them seems increasingly strong—they establish important limits on the scope of administrative regulation and important requirements for its successful operation. Paraphrased, they are as follows.

First, there are strong American political traditions of representation, of legislative responsiveness to interest groups, and of regulatory statutes granting broad, vague, administrative powers. Further, it is a political fact that for any system of regulation, periods of intense public and legislative interest and of reform activity ultimately give way to periods of quiescence. A consequence is that regulated

[62] The need of the President for a variety of tools, approaches, and channels of information and influence is made clear in recent studies of the Presidency. *E.g.*, RICHARD E. NEUSTADT, PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP (1960). See also a vivid and suggestive study, Rauh, *Government by Directive—A Case History*, 61 HARV. L. REV. 88 (1947). The plain physical difficulty of full integration appears from the very number and complexity of the organizational structures around the White House. Its political unlikeliness can be inferred from the fact that it has often been proposed, from the time of the report of the President's Committee on Administrative Management in 1937 to the present, but never achieved. Perhaps the moderate suggestions of Dean Landis in his December 1960 report to the President-elect on the regulatory agencies will be more successful. JAMES M. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT (1960) [this report has been published as a committee print by the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 86th Cong., 2d Sess. (1960)]. See the interpretation of this report in McFarland, *Landis Report: The Voice of One Crying in the Wilderness*, 47 VA. L. REV. 373 (1961).

[63] This part of the present paper draws on studies by the writer of economic regulation of airlines by the CAB. These studies were supported by the Inter-University Case Program and the Social Science Research Council, and the writer wishes to record his gratitude to those organizations. This part is also based, in part, on a study of comments by federal departments and agencies on the Code of Administrative Procedure proposed by the American Bar Association, S. 1070, 86th Cong., 1st Sess. (1959). This study was made for a committee of the ABA by a consulting group composed of Dean Leo A. Huard, Professor Rex A. Collings, Jr., to both of whom the writer is greatly indebted, and the writer. See HUARD, COLLINGS & FICK, *op. cit. supra* note 16.

[64] Emphasizing perhaps to the point of distortion, the political aspects.

[65] The disclaimers in note 37 *supra* also apply here.

[66] Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105 (1954).

[67] He quotes examples of such advocacy from JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 13 (1938).

groups, if they are organized and important, can exercise effective pressures to bend regulation their way—perhaps as the legislature creates the regulatory scheme, and certainly later on, as the administrative agency applies the imprecise generalities of the statute in days of obscurity far from the original setting of reform motives and active interest. Industry-orientation in agencies and programs of administrative regulation is not an accident nor an isolated infection, but rather a condition endemic in such surroundings.[68]

Second, the dynamic qualities of American industry and industrial organization are incompatible with systems of administrative regulation that are aimed at overall planning and management but do not take management responsibility and are disposed toward "constructive coordination" and toward neat, rational, arrangements that are both orderly and ordered. The Interstate Commerce Commission tried in the 1930's to deal with the new trucking industry within such a system, and the results were unfortunate all around. Air trunkline route certification by the Civil Aeronautics Board has seemed to be almost regularly out of phase with market and technological developments, and the CAB fought aircoach, a vital innovation but one introduced by enterprisers outside the CAB's principal client group. These are two well-known examples; others could be given.[69]

2. However, the more sweeping and radical challenges to the necessity, value, workability, and supposed effects of administrative regulation remain at best unproven, and are in many cases open to very grave doubts.[70]

A number of such challenges have been put forward since New Deal days. One of the most drastic, and one based principally on general social and political theory, is to the effect that virtually any extensive system of government regulation (administrative or otherwise), whether of industries or of other aspects of life, is inconsistent with, and ultimately destructive of, essential conditions for a free society that operates under any meaningful version of the doctrines of representative government and the rule of law. There would be much difficulty, however, in deriving from the experience of our period any clear evidence supporting this view.[71]

A narrow challenge, and one based principally on economic analysis, has been that any industry (and certainly any economy) subjected to a substantial degree of comprehensive administrative regulation is likely to be warped or drastically limited in growth and development.[72] This challenge, sometimes found in association with the first, tends to be rooted in a general economic philosophy of severe conservatism and heavy reliance on unregulated private enterprise. It is put in various ways, and the arguments for it are complex. Perhaps most commonly, however, it involves

[68] His principal specific instances of such orientation are taken from the CAB and the ICC, but his basic analysis would seem to apply across the whole field of administrative regulation.

[69] One source often mentioned is the maritime industry.

[70] Professor Jaffe's paper does not deal with these.

[71] This view is usually asserted by those influenced by the work of Friedrich A. Hayek, notably his THE ROAD TO SERFDOM (1944). For a recent criticism especially relevant here, see Jones, *The Rule of Law and the Welfare State*, 58 COLUM. L. REV. 143 (1958).

[72] See generally the modern "Chicago school" of economists.

either highly restrictive economic assumptions that abstract away from both economic and social realities (*e.g.*, an extremely high degree of purity of competition) or else political views of a Social Darwinist cast.[73] The first greatly restrict its economic relevance to the current state of affairs; the second, its political. Although this challenge has contributed valuable individual insights (things that are hard to find in the more drastic challenge first described), its validity as a general explanation or description of administrative regulation in operation seems limited.

3. Some broad views of the nature of the American economy have shed light on the operation of administrative regulation of industry, as have some technical economic studies of particular regulatory problems and specific programs.

One such view emphasizes the processes of change and growth in the economy. The system evolves constantly, new industries displace old, new methods of production and transportation appear, new forms of industrial organization are developed, new markets open and new products are devised in a continuing "process of creative destruction."[74] The consequences of this are, first of all, that administrative regulation may have great difficulty keeping pace; but, what is perhaps even more important, also that the process in some cases either sweeps away regulatory problems or does regulation's work. Thus, it is argued, the electric street car did more to improve municipal public transportation than any public commissions regulating the horse-cars ever could have.

Such arguments may in concrete instances sometimes be false ones.[75] But there can be little doubt of the vast and fundamental importance of the general process; and studies of the operation of administrative regulation must take into account, as they must also take into account the slowness of the process,[76] its generality, which may forestall or distort its effects in specific situations, and the side effects it may have.[77]

Another and somewhat similar broad view is that countervailing forces emerge, from time to time, to perform, more or less automatically, some of the large tasks that regulation is intended to perform but can perform only ineptly and intrusively. Prominent among these are some concerned with preserving the values of free markets.[78]

Of the rather substantial number of more technical economic studies of narrower coverage, only a representative few can be mentioned. Some of these have shown

[73] The political views no doubt often determine the choice of economic assumptions.

[74] The phrase is from JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY c. 7 (3d ed. 1950); and the view is most often urged by those influenced by his work.

[75] That is, the view is a product and part of a grand and exceedingly complex system of socioeconomic thought, see Professor Haberler's essay on Schumpeter in HENRY WILLIAM SPIEGEL (ED.), THE DEVELOPMENT OF ECONOMIC THOUGHT 734 (1952); and it can be legitimately used only in its own proper universe of discourse.

[76] As, indeed, Schumpeter pointed out. SCHUMPETER, *op. cit. supra* note 74, at 83.

[77] Frequently neglected by those who may perhaps appropriately be called "vulgar Schumpeterians."

[78] This view received much stimulation from the success of Professor John Kenneth Galbraith's book, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER (1952), and is connected with various of the theses about "the new competition."

that in commercial air transportation, economic regulation by the Civil Aeronautics Board has entailed serious difficulties when judged by generally-accepted economic criteria, and that freedom of entry for new enterprises into the industry and a wider scope for the play of market forces might achieve both better economic results and also better realization of the goals of general public policy and of existing specific statutory policy.[79] Others have made similar points about the Interstate Commerce Commission's regulation of rail and motor transportation[80] and about related phases of transportation regulation.[81] And others have developed telling criticisms of other regulatory efforts.[82]

The findings of the specialized economic studies have not all been unfavorable. Some have discovered little to criticize; and few, if any, suggest that either regulation generally or administrative regulation in particular be abandoned.[83] But enough that is adverse appears so as to indicate that in the economic sphere, administrative regulation has had no more than uneven and qualified success. The studies do not seem to yield one single explanation of the causes of this outcome; indeed, such an explanation may well be impossible, since the causes seem to be multiple and to vary from agency to agency and program to program. But at least two causes occur very frequently: confused or inadequate statutory mandates, and attempts to do too much.[84]

4. In recent years, there has been a great deal of lively controversy centering about the independent regulatory commissions, but involving many related aspects of the general operation of administrative regulation as well. The threads of the controversy are difficult to sort out and appraise, but the viewpoint of this paper suggests comment on a few of them.[85] Parts of the controversy have been about specific agencies and specific programs; parts have been more general, or have followed specific issues across agency and program lines.[86] Only a few agencies and

[79] LUCILE SHEPPARD KEYES, FEDERAL CONTROL OF ENTRY INTO AIR TRANSPORTATION (1951), and *A Reconsideration of Federal Control of Entry into Air Transportation*, 22 J. AIR L. & COM. 192 (1955).

[80] See ERNEST W. WILLIAMS, JR., THE REGULATION OF RAIL-MOTOR RATE COMPETITION (1958); Nelson, *Effects of Public Regulation on Railroad Performance*, in 72D ANNUAL MEETING OF THE AMERICAN ECONOMIC ASS'N, PAPERS AND PROCEEDINGS, 50 AM. ECON. REV. 495 (1960).

[81] Most often in connection with questions of competition and industry performance. See generally JOHN R. MEYERS ET AL., THE ECONOMICS OF COMPETITION IN THE TRANSPORTATION INDUSTRIES (1959).

[82] See Keyes, *Welfare Economics and the Theory of Regulation*, 34 LAND ECON. 349 (1960); the papers on *A Critical Evaluation of Public Regulation by Independent Commissions* in 70TH ANNUAL MEETING OF THE AMERICAN ECONOMIC ASS'N, PAPERS AND PROCEEDINGS, 48 AM. ECON. REV. 527 (1958); *Petroleum and Natural Gas and the Public Interest*, *id.* at 491; and *Improving the Efficiency of the Transportation and Utilities Systems*, in 72D ANNUAL MEETING OF THE AMERICAN ECONOMIC ASS'N, PAPERS AND PROCEEDINGS, 50 AM. ECON. REV. 495 (1960).

[83] Perhaps the commonest implication, aside from the familiar point that regulatory procedure has been cumbersome and slow, is that regulatory policy has been timid and overly conventional.

[84] Many of the economic studies would agree with Professor Jaffe, *supra* note 66, at 1134-35, that some comprehensive schemes of regulation might well be contracted down, and that "we should, in short, look for the *strategic control*, for that control which is the least we can get along with and the most effective for our urgent need." A familiar example of a confused statutory mandate is that given the CAB by the Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. § 1301 (substantially unchanged from the Civil Aeronautics Act of 1938, 52 Stat. 973).

[85] *I.e.*, comment on some broad governmental and political aspects.

[86] Or have been debates over administrative regulation as a whole.

programs have largely escaped criticism, and on only a few possible issues has general agreement emerged.[87]

Writers oriented to political science and public administration scholarship have long had criticisms of some of the principal characteristics of the independent regulatory commissions.[88] One of their most fundamental arguments has been that regulation requires strong direction and support from the political leadership of the government (and ultimately strong support from public opinion) if the agency is to make headway against adversely regulated interests and to maintain its independence from them.[89] Typically, the argument has gone on to assert that the independent commission, by its very independence, tends to be fatally isolated from its natural source of such direction and support, the Presidency. To this is often added the further contention that to be effective, regulation must be coordinated with the work of the executive and the administrative generally, and that independence limits this coordination.[90]

On the other hand, authors writing from other viewpoints (*e.g.*, that of scholarship in administrative law)[91] have expressed doubts about all this. They have urged, for example, that in general, the administrative process, as it presently exists, can pretty well stand on its own feet; that there is still much merit in some implications of the traditional view that regulation is engaged partly in "quasi-legislative" and "quasi-judicial" tasks that require separation from the Presidency; and especially that in the latter tasks, where individual cases are being decided, considerable separation is required to preserve fairness and impartiality. They have suggested that many problems, such as those of agency feebleness, of domination by regulated groups, and of improper particular influences, are not consequences of independence alone, and in any event, can be dealt with by specific reforms.[92]

This large bundle of issues appears incapable of resolution as things now stand. There are obviously strong arguments from general principle available to all sides. But more refined analyses, and especially more concrete situations, are needed before these arguments can be made to yield defensible answers to specific questions.[93]

Another line of thought is found in the work of a group of critics oriented

[87] All have seemed to agree on the value of democratic responsibility; there has been no enthusiasm for an autonomous bureaucracy.

[88] MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION (1955), summarizes these. See also Odegard, *A Case for Scuttling Regulatory Agencies*, Washington Post & Times Herald, May 1, 1960, p. E-1, col. 5.

[89] This argument is related to the "group theory" of politics, but is independent of it and not necessarily vulnerable to the same criticisms.

[90] This contention was already made in the PRESIDENT'S COMM. ON ADMINISTRATIVE MANAGEMENT, REPORT (1937).

[91] There is also an immense body of nonscholarly materials.

[92] *E.g.*, much of the testimony in *Hearings*, *supra* note 1. A thoughtful review of the whole matter is Jaffe, *The Independent Agency—A New Scapegoat*, 65 YALE L.J. 1068 (1956). An example of this approach to one problem is Note, *Ex Parte Contacts With the Federal Communications Commission*, 73 HARV. L. REV. 1178 (1960).

[93] Some evidence collected by the present writer on economic regulation by the CAB suggests that it is not very clear how closer ties to the Presidency would solve the problems of that agency.

toward economics and concerned primarily with antitrust problems and with the general relationships between the economic and the political systems.[94] Sometimes, emphasizing the characteristic complexities and dynamisms of a modern economy, the scope and power of modern corporate groupings, and the weapons at their disposal, this line of thought expresses doubt both about the efficacy of unaided market forces to maintain a sufficiently competitive and unmonopolistic economy, and about the feasibility of constructing systems of administrative regulation adequate to cope with the forces tending toward concentration and control. Outlining a large design, it sees a problem of a grand sort for policy and action in all branches of the political system.[95]

Sometimes, working on a narrower canvas, this view addresses itself to specific agencies and programs of administrative regulation or argues for specific measures. In this vein, it has suggested that administrative regulation has often displaced open competition and the play of market forces without putting viable and effective alternatives in their places, and, indeed, has often become a shelter for restrictionism. Thus, for example, the Civil Aeronautics Board and other specific regulatory agencies and many other specific programs have been critically analyzed, and remedies such as stricter antitrust standards in regulatory statutes and abolition of particular regulatory controls in favor of market forces have been urged.[96]

The volume and concreteness of the evidence these critics have assembled, the thoroughness and precision of their investigations, and the appeal of the values they urge give their contentions a weight that commands respect. Without venturing a judgment on the final validity of these contentions, we must feel that at the least, these critics have shown that there are vital and unexpectedly difficult problems in this area, and that administrative regulation has dealt with them in a less than fully satisfactory way.[97]

5. Procedure in administrative regulation, like administrative procedure generally, has been, during almost our entire period, the subject of much interest and of much controversy. Reflection on the experience of the period suggests the rightness of this emphasis; procedure is, in truth, a crucial aspect of administrative regulation in many ways and is part of the central complex of the issues and achievements of the system.[98] A primary and basic point to be made is that procedure is the machinery by which the political power of administrative regulation is formally exercised and, further, that it exerts important influences on informal, indirect, and collateral exercises of this power as well.[99] Analysis in terms of political power,

[94] This thought is often another aspect of work of the sort cited *supra* notes 79-82.

[95] The work of Walton H. Hamilton is classic. *E.g.*, WALTON H. HAMILTON, THE POLITICS OF INDUSTRY (1957).

[96] Numerous legal scholars have joined in this.

[97] For an account of the especially unhappy effects commission regulation can have on small business, see Adams, *The Regulatory Commissions and Small Business*, 24 LAW & CONTEMP. PROB. 147 (1959).

[98] *I.e.*, procedure in the lawyer's sense. Unfortunately, what we can say is mainly about formal procedure. All too little is known about informal procedure, although some beginnings are being made. *E.g.*, Woll, *supra* note 59.

[99] Indeed, procedural requirements set a framework for virtually all administrative regulation.

an approach used throughout the present paper, is, therefore, peculiarly useful here.

Some of the struggles over procedural questions, especially those of New Deal days, have been clearly recognized as struggles over power. Opponents of administrative regulation have sought to strangle it by getting complicated and restrictive procedural requirements imposed by legislation or the courts. Its supporters have sought both to give it overwhelmingly powerful procedural weapons and to free it from inconvenient procedural restrictions. Extreme statements have been common on both sides.[100]

It is also clear, although perhaps not so generally recognized, that less intense controversies over procedure can have, and many have had, strong elements of power struggle. Thus, for example, a regulatory agency that is required to treat a matter as a formal adjudication, handle it on a separation-of-functions basis, decide it on a record, and issue findings and an opinion in support of the disposition, subject to broad judicial review, is, as compared with an agency not subject to these constraints, a very much less formidable combatant in, say, struggles with interest groups that oppose its regulatory activities and policies.[101] Not only are innumerable grounds for judicial intervention in its affairs available to be urged against it by such groups, but also its general freedom of maneuver is much cut down and its decisions and decision-making processes are forced more out into the open, where they are more accessible to attacks *via* public opinion campaigns, technical criticism, legislative investigation, etc.

The devising and operating of effective and acceptable procedures and setting the types and amounts of procedural constraints to be imposed on administrative regulation have presented difficult problems, and the processes of government have struggled painfully over them. A few general comments on what has been accomplished are offered here.

Constitutional limitations and requirements have become rather well settled, although some uncertainties remain and some shifts in the boundaries do occur.[102] The constitutional minima protecting those subject to the administrative process are rather low, however, leaving numerous questions, some still unsettled, of how much more is required in various circumstances by considerations of fairness and good policy.

A body of general law of administrative procedure has emerged that is more uniform and broader in its coverage than might be supposed in view of the frequently heard assertions that every agency and every program has many unique problems and methods.[103] In addition, there seems to be a good deal of further

[100] Scattered through a very large part of all the materials we have cited.

[101] This is well-recognized by opponents of "judicialization."

[102] 1 DAVIS, *op. cit. supra* note 1, c. 7, and 4 *id.* cc. 28 and 29.

[103] *E.g.*, such assertions were very common in agency comments on the ABA Code. See *supra* note 63. Many of these appeared overstated, but there are, in fact, some significant variations. See the discussion in Westwood, *The Davis Treatise: Meaning to the Practitioner*, 43 MINN. L. REV. 607 (1959).

uniformity, in the practice and custom lying beyond the actual law of procedure.[104] A very detailed body of rules of procedure and practice applying to all agencies and programs may be impossible.[105] But a rather complete general code of virtually universal coverage seems quite possible; indeed, what appears to be a very satisfactory and workable one has already been proposed.[106]

In many respects—perhaps even in most—administrative procedure as now established functions well.[107] However, some troubles clearly exist, newly emerged or chronic.[108] Discussion of these is particularly active just now, and a variety of proposed remedies are in the field.[109] Some of the proposals appear to be based upon misunderstandings of the nature of the administrative process, or upon a belief that certain troubles or seeming troubles are procedural, when, in actuality, they are produced by other causes.[110] On the other hand, there are proposals that seem eminently sound and valuable.

The most important and difficult issues of administrative procedure, however, are not simply issues of efficient management of agency business, nor even of clarity and logic in administrative law; rather, they are basic issues of politics and government.

CONCLUSION

This paper has been an attempt to get a general view of some of the broad governmental and political processes that have affected administrative regulation in the last twenty-odd years; then to analyze the effects these have had on the problems, issues, goals, and achievements of administrative regulation during that time. That is to say, it has been an attempt to locate administrative regulation in these processes and to discover something about its relationships with them. The inquiry has produced a good many specific conclusions on both these matters. But, most of all, we end it with a heightened sense of how very much a part of the political order administrative regulation is.

[104] This also appeared in agency comments on the ABA Code, *supra* note 63, and in the House Government Operations Committee study, *supra* note 1.

[105] See, *e.g.*, the limited recommendations of the PRESIDENT'S CONFERENCE ON ADMINISTRATIVE PROCEDURE, REPORT (1955).

[106] *I.e.*, the ABA Code, with the amendments suggested by the consulting group that studied agency comments on it, *supra* note 63.

[107] Though there are few broad surveys, across the whole field, on which firm judgment can be based.

[108] *E.g.*, *ex parte* contacts, delay, volume and expense, inadequate policy development, etc.

[109] See, *e.g.*, materials cited in notes 1, 16, 45, 55, 59, 66, 88, 92, and 107 *supra*. See also Hector, *Problems of the CAB and the Independent Regulatory Commissions*, 69 YALE L.J. 931 (1960) [this report has been published as a committee print by the Senate Committee on Government Organization, 86th Cong., 2d Sess. (1960)].

[110] Such as those discussed in pt. III of the present paper.

ADMINISTRATIVE REGULATION IN COMPARATIVE PERSPECTIVE

FRITZ MORSTEIN MARX*

I

Comparing is a means toward understanding. This being so, we may expect to enhance a proper assessment of administrative regulation by looking at the record of foreign experience. Perhaps there are lessons that deserve consideration—or cautions, or hints. Even a dull tracing of parallels may help to clarify trends and tendencies.

For obvious reasons, however, comparison is most fruitful when its object does not change from place to place. To a rider, the care of his horse is likely to be of considerable concern. But he would not get much enlightenment from inquiring into the treatment of man's mount elsewhere if man's mount elsewhere happened to be an elephant, or a camel, or a burro. In its most precise meaning, perhaps, administrative regulation as talked about in the United States does pose the same problem. In certain respects, it is something peculiarly home-grown. It may be too American for comparative examination to yield a full harvest.

The implications of such doubt are enlarged when one remarkable thing is borne in mind. It comes to light in the fact that the prevailing mode of reference in the United States links administrative regulation with the imposition of authority over economic interests, with the powers of government as they affect business. Administrative regulation thus is focused primarily on statutory clauses, public agencies, and official procedures, on the one hand, and on economic practices, on the other. Surprisingly little attention, by and large, has been given to the social matrix of administrative regulation, even to its basic ends. The degree to which administrative regulation is—or ought to be—an expression of government's fundamental concern with order, so as to provide a favorable environment for the unfolding of man's creative resources, is rarely placed under the magnifying glass. Much less is made of the significance of regulation as the essence of organized group life, of society itself, separate from government as its policeman, promoter, equalizer, and repairman.

For these reasons, it is probably useful to begin our brief exploration of comparative perspectives with some reflections on the social roots of regulation. As the organized state, for all practical purposes, is the bringer as well as the guardian of law, so is the state the source of formal regulation. But such formal regulation, in

* J.D. 1922, University of Hamburg, Germany. Professor of Political Science and Dean of Administration, Hunter College. Formerly Ford Foundation Research Professor in Governmental Affairs, Princeton University. Author, THE ADMINISTRATIVE STATE: AN INTRODUCTION TO BUREAUCRACY (1957). Editor, ELEMENTS OF PUBLIC ADMINISTRATION (rev. ed. 1959); FOREIGN GOVERNMENTS: THE DYNAMICS OF POLITICS ABROAD (rev. ed. 1952). Contributor to legal periodicals.

the last analysis, represents the more or less adept management of society's inherent regulatory urge. Underneath all regulation is man's elementary need for obtaining, as a minimum, a suitable balance of advantage and disadvantage from the rewards and risks of group living.

What is a suitable balance, at least in minimal terms? Who is to be the judge? Man singly cannot prevail in this allocation of benefits and sacrifices, except as the tyrant or the demagogue. So he seeks strength, safety, and comfort by getting on the bandwagon of dominant community mores and sentiments, by accepting the guidance of the sense that seems common. Such guidance stems in part from individual foresight and group experience, but has other sources as well. It may flow, in part, from superstitions; or it may have crystallized, in part, in traditions; or it may be, in part, the output of opinion-manufacture, engaged in by the few to exploit the many; or it may express, in part, concepts of celestial partisanship to which human beings must bow reverentially.

These and similar influences spin the fabric of regulation. They furnish answers about right and wrong. They have produced in the United States that most extraordinary, well-nigh pornographic body of regulatory provisions aimed at chaperoning sex—provisions having more rather than less of a bite when made to snap at victims but highly selectively. The local interplay of these influences explains why there may be a difference of twenty years behind bars depending on whether seduction is proved in one state of the union or another, as Morris Ernst once concluded.[1]

When we turn from society's ceaseless efforts in weaving the web of regulation to those of government, it becomes clear at once that the most pervasive factor consists of the close relationships between both areas. But government is a structure designed to integrate the forces of society, to bring about civic commitments, to provide the forms available for legitimate public action. In its own structure, government, therefore, lays out channels of group influence and, consequently, strategic points of control.

It follows that the representative system, together with its obscure alley-ways, becomes the terrain in which political field commanders move their troops for closely calculated victories, often quite independent of what the public wants. The regulatory propensity of society may thus be diverted by an adroit superimposition of group goals, as in the case of the American Medical Association, to name a single but striking illustration. In the sphere of governmental activity, much depends on how articulate groups are, whether they are sufficiently well-off to make themselves heard widely, and whether the general public has discerning ears. Conversely, much depends on the counterweight of a common rationality, a "public philosophy" in Walter Lippmann's sense,[2] and the capacity of the party system for evolving programs having broad appeal.

[1] Ernst, *The Kinsey Report and the Law*, 70 SCIENTIFIC MONTHLY 279, 281 (1950). See also 2 SIDNEY POST SIMPSON & JULIUS STONE, CASES AND READINGS ON LAW AND SOCIETY 1033 n.1 (1949).

[2] WALTER LIPPMANN, ESSAYS IN THE PUBLIC PHILOSOPHY (1955).

From this vantage point, we come to a view of regulatory agencies different in many respects from that encouraged by prevailing nomenclature. On the primary level, and putting it quite abstractly, society itself is a regulatory agency of vast importance. In more concrete manifestation, as something harnessed by human wills in order to attain specific objectives, regulatory agencies are characterized by a more sharply delineated focus of interest as well as by greater attention to organizational form.

But these agencies are by no means all governmental. Many are private in nature. Of these, some attempt a type of self-government of particular occupations. But one must not overlook the more familiar categories of interest groups, ranging from churches or patriotic societies to trade associations and labor unions. Such agencies generate power as a consequence of their very existence and in proportion to their basic strength. Thus, part of the regulatory capacity of society comes to lodge within them.

Either as an outcome or as an activity, regulation, therefore, resembles a contest between sources of influence. Of necessity, the regulated are simultaneously regulators in a real sense, and the center of gravity—or the actual locus of regulatory power—is shifting in some ways all the time. Expressed differently, to assume that only public agencies are engaged in administrative regulation is to restrict the field of vision beyond all reason.

Indeed, for the most part, the failure of public agencies to pursue their regulatory mandate with sufficient energy can be traced to a latent veto emanating from society itself. Nominal authority parceled out to governmental agencies is frequently immobilized by conflicting regulatory dispositions embodied in private agencies. The aims as well as the scope of administrative regulation may thus be said to be the object of a continuing disputation among the participants of the regulatory process. Thesis and antithesis seem drawn together in a single corpus, as it were.

By comparison with such a condition of near-equilibrium of public and private agencies, the regulatory pattern may demonstrate under other conditions the militancy of a popular movement, of an emotional drive, even of a venerated formula. Something like this is in evidence in the evolution and the stature of France's *droit administratif*. Originally the result of a revolutionary upsurge against the domination of administrative power by an unsympathetic judiciary, hailed as a liberation of the people's prerogative from its enslavement to the judges, the new administrative law had a populist aura that gave it ideological substance. As a consequence, private as well as public agencies fitted themselves into the magnetic field left by the French Revolution of 1789. The result has been that *droit administratif*, despite its aloofness from partisan causes and despite the change in regimes, remained all along on speaking terms with the common man. For its extensive area, administrative law reflected an unchallengeable settlement in the war of purposes, public and private, an element of the active constitution. It maximized the guidance

needed by public agencies and minimized the interposing power of private agencies. In short, it served as a source of effective social discipline.

But France is here no more than a respected voice in a continental European chorus. No less pertinent are the comparable institutions of other countries, including the German example, built about the *Rechtsstaat* idea as the most tangible safeguard of legality for the "ordinary man" when he felt the grip of administrative power. There may be little in this concept that is not equally implicit in the Anglo-American version of the "rule of law." The difference in the practical significance of the two lies in the impact upon administrative regulation. In a nutshell, with us, a Hewart of Bury[3] or a Roscoe Pound,[4] with bravoes from the legal profession, might step forth to exorcise the demons of bureaucratic arrogance. In Germany, the *Rechtsstaat* idea became a powerful factor in the orientation of the bureaucracy itself, a binding standard of lawful action and concern with right germane to the outlook of a self-conscious middle class.

II

We reminded ourselves of the regulatory urge that rises within society from its very nature in order to stress the derivative character of governmental regulation. Without the first, the second would lack foundation. Society produces the sound, so to speak, and government the echo. But such a statement requires qualification to match the facts without distortion. Being organized rather than organic, being established rather than grown, government serves as a man-made instrument of purpose. If society is what's in the kettle, government is the spout, together with the hand that does the pouring. Unfortunately for competent pouring, however, the spout may be split as well as full of holes; and instead of one hand, there may be haphazard grappling of many.

Measured by the equivalent of splits and holes and hands, then, the operational effectiveness of government can be appraised over a hypothetical range ascending from bottom to top. As an active force, government—or the state, to use once more the classical language of political theory—is not a constant, but a variable, which, in turn, is profoundly affected by other variables, political, economic, and social. Granting that much, it is self-evident that the same must be true of regulation. Whatever the legal prescription for the mechanics of the regulatory process, of critical significance for the character of its performance is its general environment, the "parallelogram of forces" about it.

Ultimately, of course, regulation is to provide the signposts of human behavior. But the purpose may be defeated when there are too few or too many such posts; or when it becomes a national sport to push them over; or when they are habitually ignored, though kept in place, as if for decoration. The attitude of most Americans toward the Eighteenth Amendment at the height of the campaign against honest liquor is a case in point.

[3] HEWART OF BURY, THE NEW DESPOTISM (1929).

[4] *E.g.*, ROSCOE POUND, ADMINISTRATIVE LAW: ITS GROWTH, PROCEDURE, AND SIGNIFICANCE (1942).

Complete defeat of regulatory purpose is relatively rare under normal conditions of government in the contemporary western style. But there is much ground to traverse between such defeat and the often naively assertive language of administrative regulation. Between these two poles, one encounters the evidence of relative success that may be claimed for different regulatory patterns. Here, then, are found the telling differences of degree—distinctions that run far less frequently to white and black than to varying shades of grey. In spotting these differences, we are bound to deal, time and again, with a considerable array of variables. Indeed, each characteristic of a given regulatory prototype continuously evolves its variants in terms of more or less.

The civic acceptance and thus the basic efficacy of administrative regulation are linked in a primary way with several factors. One worth mentioning first is the degree to which the public at large is inclined to identify itself with government, as the agency of the common good. That is partly a matter of constitutional arrangements for political participation of the citizenry in the determination of general policy. Partly it has to do with the relative standing of private enterprise and public enterprise in the forum of mass opinion. And partly it is the result of the institutional resources commanded by government, of its capacity for accomplishing what it sets out to do, of the intellectual equipment of its public service.

In such combination of ingredients, a country like Sweden, for instance, would rate toward the top. She has long enjoyed an easier synthesis in her national life than would have been conceivable in the United States, granting its historic evolution, especially during the nineteenth century. It is, therefore, not surprising that Swedish administrative law, despite the essential simplicity of its conceptual structure, reflects a high degree of social consciousness and sophistication—qualities that have often been stressed by as great an authority as Professor Herlitz.[5]

Another factor relevant to our discussion is the degree to which government succeeds in unifying the pluralistic drives and tensions of society. To acknowledge this aim is not to deny the essentially plural nature of any aggregation of human beings, each sewn into his skin, each lastly the captive of his self. Man may seek to tranquilize himself under layers of woolly "togetherness," but will yet continue to turn into an obstreperous nuisance in the most elementary group processes when his changing moods so prompt him and his restraints give way. However, by accepting the fact that society is plural of necessity, we merely emphasize the correlating task of government. The many must manage to be one, for certain purposes and on certain occasions; and to do that, they must work toward being one by learning to move in formations. When government does not rise above the diversity of society, it sacrifices its organizing purpose. It fails to furnish common denominators for social advance as well as for order and freedom. It leaves the cooperative energies of society without a formula to provide direction.

[5] See, *e.g.*, Herlitz, *Swedish Administrative Law: Some Characteristic Features*, in 3 SCANDINAVIAN STUDIES IN LAW 87 (1959).

Here, again, the variables of more or less are in evidence. The pluralism of interests may largely remain unmitigated for want of a party system strong enough to become the taskmaster of utilitarian union. If there is such a party system, it is likely to force the interests into coalitions and alliances that in themselves amount to a first-level coordinating effort. Party programs push what is special toward an acknowledgment of what is joint and even what is general, at least within the kinship order that connects compatible special interests, whether one thinks of the economic, the social, or the broadly cultural realm.

When party programs serve to bring and hold together certain interest groupings, when each comes to respect a common bond uniting it with certain others if only pragmatically, the program of a party is bound to follow it into the driver's seat. Party programs, in so far as they signify a coalescence of kindred interests around mutually desirable political objectives, are fit to be converted into governmental programs when the party is carried into power. Programs that convey marching orders for political action are like current running through the entire structure of government. One dominant impulse simultaneously actuates both legislation and administration. Then the approach of a particular regulatory agency cannot be expected to be self-centered and insular. On the contrary, it will operate in the stream of government-wide responsibility, be, therefore, more visible to the public eye, and consequently itself gain in sense of responsibility.

When painting with a broad brush, one has to sacrifice, to some extent, the finer shadings. Contrasts are often sharpened beyond the point of impeccable accuracy. It is, therefore, well to remember that in the process of comparison, we are substituting repeatedly rough approximations of reality for the precise verification of each factual component. But such approximations are quite satisfactory for our present purposes. Even when one talks in approximations, it is easy to recognize the validity of contrasting an institutionally unified political system, relatively speaking, with one that generates divisive forces by its own design, again relatively speaking.

The United States belongs in the second category. The Founding Fathers proved unwilling to plan either for themselves or for those groups closest to them a role of assured elitarian domination. They planned instead against domination itself. Federalism, the separation of powers, the dual structure of the legislature, the opportunity for judicial challenge of every type of authority—all these militate against an easy attainment of the integrating function of government. None of the instrumentalities of division has merely negative implications. Each has contributed values that have been entered on the ledger of American growth. But there is no question that, precisely for the same reason, the United States has periodically been agitated by the impatient quest for a true pattern of public responsibility. At progressively shorter intervals, the same battle cry was heard. There was to be an end to the fragmentation of power, to the escape from answerability, to the reckless scattering of government's precious capacity for action in the general interest.

For a long time, America's political image—to use a term lately touched by too many unwashed hands—was overwhelmingly custodial. It was centered on the preservation of "soundness" as the "consensus" of a raw, yet creative enterprise society. Such preservation did not require strong arms. Rather, it was to be accomplished by the massive weight of an acquiescing attitude. In these circumstances, the outline of public responsibility could well stay blurred. When it comes to deploying the forces of government for action, for the achievement of objectives given priority by being part of a program, responsibility must be poised in an ascending order, as a rationally intelligible structure. When the pressure of weight suffices, responsibility can afford to be diffuse—if it is still properly called responsibility.

As long as the custodial function of government was dominant, and as long as the "consensus" of society, in turn, dominated that function, the specific operations of public agencies did not matter greatly. For the most part, they could be left to political patronage. A new class of middlemen had come forth. Although habitually derided as "politicians," they had one redeeming grace. No one could blame them for being in the middleman's business for the sake of business. But they could be trusted, by and large, to respond instinctively to "soundness," to the "consensus" of society, especially to the property symbolism. There was nothing decadent about it. When Lincoln Steffens pitted his moral determination against the "bosses," he could not fail to discover at last that he was confronting the vitality of Henry Clay's "American System."[6]

Small wonder that the reform movement in the early decades of our century preached concentration of responsibility, together with a professionalization of the public service. If these had not been goals in conflict with the buccaneering habits of party machines, the American people might have been spared the high-class passion for "nonpartisan" partisanship. As it was, such leaders as Charles E. Hughes, Elihu Root, and Henry L. Stimson, each uncommitted to a party gospel, had to make their own way in battling against the old political order.[7] They addressed themselves to reshaping the "consensus" of society, without attempting to blow new life into the limp body of the party system.

What has emerged from the reform movement is difficult to overestimate. Broadly speaking, it is the gradual fashioning of the essential equipment for reasonably effective government in the United States in the face of twentieth-century needs. The markstones stand out in time, slow as the development might seem to the impatient. 1906 saw the beginnings of the New York Bureau of Municipal Research, the first significant venture in cooperation between public-spirited business captains and the new professionals in administrative analysis.[8] In 1917, the state

[6] See LINCOLN STEFFENS, THE STRUGGLE FOR SELF-GOVERNMENT (1906).

[7] See HENRY L. STIMSON & MCGEORGE BUNDY, ON ACTIVE SERVICE IN PEACE AND WAR (1948); see also HARLAN B. PHILLIPS (ED.), FELIX FRANKFURTER REMINISCES (1960).

[8] See N.Y. BUREAU OF MUNICIPAL RESEARCH, SIX YEARS OF MUNICIPAL RESEARCH FOR GREATER NEW YORK: RECORD FOR 1906-1911 (1912). The Bureau's working approach was described as "that of patient, scientific inquiry and genuine helpfulness." *Citizen Agencies for Research in Government*, Municipal Research, no. 77, Sept. 1916, p. x. As William H. Allen, one of the founders of the Bureau expressed it:

of Illinois brought the critically important function of budgetary planning and fund control directly under the governor, as a "strong executive." Four years later, in 1921, Congress passed in virtual unanimity a piece of legislation that aimed in the same direction, but actually reached out much farther. It managed to hide its quasi-constitutional impact behind the opaque designation of Budget and Accounting Act.[9]

The Act did set up badly needed fiscal machinery for estimates review, expenditure control, and independent audit. Much more far-reaching, however, were four other features of the law. In the first place, responsibility for providing Congress through the annual budget with a comprehensive and integrated plan of operations for the federal government was squarely put upon the President. But this time a solemn invocation did not seem enough. Words had failed in earlier laws to prompt deeds. The Act, secondly, took care of this difficulty by placing at the President's elbow a thing stuffed with potentialities, something that in any such explicit form had not existed before. The new thing was a staff agency, the Bureau of the Budget, exclusively under the President's command, to help him with the chores of his office, in the wider executive as well as in the budgetary spheres. The position of Budget Director was so designed in law as to make him in every sense "the President's man," leader of a continuing professional staff, a presidential fact-finder who would furnish direction over this staff from the angle of the President.

Thirdly, the Budget and Accounting Act made it expressly a duty of the new bureau to engage in management analysis and to conduct administrative studies in particular federal agencies. This was more than a matter of ampler jurisdiction. Rather, by doing so, the Act caused the budget agency to lift its eyes above accounting sheets, toward the functioning of the apparatus available for accomplishing the President's program and toward the problems to be solved as well. And lastly, the Act provided a foundation for turning the Budget Bureau at the same time into the President's clearing house for legislation. In reviewing legislative proposals, session upon session, the Bureau again was encouraged to temper the negative predisposition of a financial watchdog with careful consideration of the legislative means for carrying forward the President's policies. The Budget Bureau's responsibility was as much oriented toward getting things done as it had to do with control over spending.

III

Why these observations about administrative growth? Simply to make very clear that Government in the United States has radically changed its operating style

"Every public administrative centre should have a fact centre." WILLIAM H. ALLEN, EFFICIENT DEMOCRACY 261 (1907). The ideal of "efficiency" was captivating at that time not only the world of business, but also other realms. Thus, Professor William H. Allison declared: "The essential apostolic qualification in American Baptist polity has been efficiency." Allison, *The Basis of Baptist Polity*, [Baptist] Standard, March 30, 1907, p. 923. See also SHAILER MATHEWS, SCIENTIFIC MANAGEMENT IN THE CHURCHES (1912).

[9] For the budgetary development in relation to executive responsibility, see Morstein Marx, *The Bureau of the Budget: Its Evolution and Present Role*, 39 AM. POL. SCI. REV. 653, 869 (1945).

since the Interstate Commerce Commission struggled through its first day of business in 1887. It is in our own century that the Presidency has come to the fore as a unique institution of governmental cohesion and program coordination, besides revealing itself as a vast repository of political strength. It is in our own century that American public administration has assumed truly professional characteristics, in both day-by-day competence and intellectual resources employed for policy planning. It is in our own century that the staff organization available to the President himself has attained a high degree of institutional maturity. Past and present are set apart. It is for these reasons that the view of American government and administration that is still prevalent in so many places abroad is hopelessly outdated.

Although it is hard to say how America sees itself today in the governmental dimension, one thing is quite certain. The administrative realities of the mid-twentieth century leave little of the incoherent theory that nurtured the nineteenth-century American approach to administrative regulation. Above all, the promise of impregnability against partisan inroads, assurance of expertship, and institutional autonomy that was advanced by the concept of the so-called independent regulatory commission would not survive immediate challenge if it were to come up in our day as a fresh idea. Indeed, to put it bluntly, were it conceivable that the regulatory pattern in the United States had yet to be made at this hour, free from the burden of what has become distressingly familiar from the past, a groping for solutions on the model of such commissions or boards would seem highly unlikely.

However invigorating the Jacksonian movement had been as a breakthrough of popular rule, the deterioration of government's administrative performance that accompanied it proved to be an enormous liability. The pervasive consequences of political patronage as a common means of filling political offices made administrative agencies ineffectual rather than responsive to the people's will. The decades after the Civil War showed federal administration in a condition of ineptness and lethargy. If one had to live with the still debatable idea that interstate rail transport needed the federal government's attention, something more seemed necessary than the unenlightened ways of a patronage bureaucracy. From this vantage point, it was realistic to look for a new mechanism equal to the large task to be attempted.

In the circumstances, then, it was not illogical to assume that regulation of a sensitive sector of the economy called for a special instrument. Partisanship in the spoils tradition would not do. Nor would ignorance and bungling on the part of unskilled officials. Neither did it appear tolerable at the opening of the regulatory era to expose the ministrations of the expert's hand to the dangerous contagion of loose-jointed administrative practice in the central departments, on the one hand, or to the manipulative grip of the President as chief executive, on the other. The independent regulatory commission, if implanted in the no-man's-land between legislation, administration, and justice, promised to be exactly the right answer to these specifications.

But change in later decades has been sweeping. With the Presidency as the main-

spring of administrative energy in the national government and with the federal service a career establishment of recognized attainments and still greater potentialities, the independent regulatory commission is now becoming a museum exhibit. Politically, it has shown itself an easy touch for greedy fingers, largely because of the ambiguities that surround its purpose as well as its status. The isolation of its existence, away from the general concerns of the executive branch, makes it timid, stodgy, and slow. The discipline of commitment to a government-wide program is lacking, and with it a sense of common urgency. Moreover, collegial management, despite some recent strengthening of the chairman's arm, has continued to be mostly a burden on good administration.

This is not the place to enter into a detailed examination of what ails the independent regulatory commission. What is important is to bear in mind that the pattern of administrative regulation in the United States evolved from the deficiencies in the general style of departmental operations. Conversely, the changed character of administrative performance cannot be left aside. In the day of the "service state," government is reduced to a rather limited choice. It can either develop within its own cadres the resources needed for effective administrative regulation, or it must allow those to be regulated to settle down on its back.

These considerations are reinforced by a look at other administrative systems, especially those that matured at an earlier date. In France, in Brandenburg-Prussia, and even in England, the adaptation of governmental processes to the evolving requirements of an economy acquiring urban-commercial characteristics occurred under auspices of monarchical power, in the shadow of the rising nation-state. Its backbone was an integrated order of offices, especially on the European continent. A single administrative apparatus was built up, as the unifying instrument of the crown. It was manned by "king's men," chosen for competence as well as loyalty, a novel standing army pledged to serving the new state—the forerunner of today's merit bureaucracy. Thus, government staked out its managerial claims. The eighteenth century witnessed the consolidation of effective administration in Prussia and Austria. Shortly afterward, the Napoleonic era carried France toward the same goal. And England followed suit in the midnineteenth century, by laying the foundation for the modern British civil service—so long a gleam in the eye of American spokesmen of reform.

As administrative regulation in Europe geared itself for the pressures of the industrial age, it represented a pretested pattern. A search for *expertise* combined with institutional staying power was bound to lead back to the normal working methods of the public service. The writings of administrators around the turn of the eighteenth century, for the most part distinguished by both an eminently practical approach and a philosophical disposition, attest the degree to which competence in thought and action had come to lodge in administrative offices. The essential unity of the departmental system was becoming a continuing concern of the emerging career service. At the same time, professionalized administration grew

conscious of its assets. It saw itself—and was generally respected by the public—as a body knowledgeable in the ways of achieving policy goals by organizational as well as procedural means; divorced from the interests that wrestled with one another for influence and accommodation; and able to stand its ground in the storms of politics.

The administrative systems of Europe, especially those of the continent, achieved a respectable degree of effectiveness before the same condition was attained generally in the United States. With us, in the 'eighties, to accomplish the application of *expertise* in a novel venture such as the regulation of the railroads, it seemed best to break out of the bounds of the departmental structure. Outside, the air appeared fresher and cleaner. Outside, there was the chance of an uncontaminated start. In Europe, by contrast, the regulatory approach was woven into the operational heritage of government. It was at the very heart of the administrative process. To insure resourceful regulation meant to rely on the familiar methods of familiar public agencies, staffed by men trained to administer.

No new device was needed. What was needed—and what unfolded, stage by stage, during the first half of the nineteenth century—was a fully developed pattern of redress against administrative determinations. Characteristically, it was a pattern general in scope rather than confined to particular governmental functions. It was informal, rather than weighted down with procedural ritual. It operated in a manner informed rather than legalistic. And its benefits remained within the reach of the ordinary mortal's pocket, rather than being accessible only to those who need not limit their interest in relief from unwarranted impositions because of economic pressure to avoid considerable costs.

Thus, the problems of administrative regulation were seen abroad mainly as problems of public accountability. They were not seen primarily as problems of organizational structure or agency procedure. The emphasis was on the general law of administration as a source of authority, and as a limitation of authority as well. But law amounts to little when it sleeps in peace. It needs to speak. Administrative law called necessarily for a spokesman. This spokesman entered upon the scene in the form of a specialized judiciary, of judicial bodies distinguished by thorough knowledge of the practical business of public administration.

It is difficult to imagine how the concept of a separate judiciary for disposing of citizens' suits against administrative agencies could have made much headway except for one critically important factor. That factor was the commitment of the ascending merit bureaucracy to the ideal of law and order, and thus to the ideal of limited authority. To say that this is an ideal peculiarly congenial to maturing merit bureaucracies is not to detract from the achievement. In a relatively primitive condition, bureaucratic elites are prone to view the free sway of administrative authority as the very foundation of law and order—and hence as its equivalent, even its essence. As their sophistication increases, and as the simplified formula of an earlier day has

to be abandoned, they tend next to fall into escapist habits. The judicial test is too icy a shower, if it is not being dreaded as the fire of the purgatory itself.

This is an attitude typical of administrative systems that suffer from paucity of public esteem and, therefore, lack self-confidence. Fritz Fleiner, the great teacher of administrative law famed for his *Institutionen*,[10] used to pour scorn on the reluctance shown by the Swiss civil service toward entering fully into the spirit of legal redress, even though the Free Confederacy can hardly be said to furnish a climate favorable to an authoritarian disposition. Similarly, the career man in Washington, more often than not, counts it as a victory when a judicial test of administrative power can be avoided. We need to add, perhaps, that the judgment of a court of law, to him, may seem vastly less predictable than the agreements coming forth from even an obscure alignment of forces in a congressional committee.

Droit administratif and its genuine counterparts elsewhere in the world reflect a higher stage of growth in the evolution of the merit bureaucracy. The administrative profession, in this stage, is ready to accept the idea of a legitimate grievance on the part of the individual. It undertakes to invite the *actio popularis* as a beneficial rod, to bow to the need for a legal defense in justification of its deeds, and to permit a free probing of the supporting arguments. Not surprisingly, this bent of mind was bound to produce a quasi-proprietary attitude toward administrative law within the career cadre. It was now a matter of honor, so to speak, to stay on the side of legality, even in the face of strong temptation to laugh off the judicial test. Dedication to the umpire's integrity of administrative law thus became the hallmark of the tried-and-true career man in public service.

These factors explain very largely why in France, in Germany, in Austria, and in other parts of continental Europe, it was the higher civil service that regarded itself as the pillar of administrative law. The elaboration of both the individual's sphere of guarded privacy and the governmental agency's range of authority could not have been accomplished as something external to the public service—and laid upon it like a yoke. Professional concern with the limits of administrative power and the extent of the citizen's rights transformed itself into an aspect of the official milieu. By becoming part of the bureaucratic culture, *droit administratif* and *Verwaltungsrecht* turned into a counterbureaucratic force, keeping the officialdom within the orbit of a common law that showed marked equalitarian tendencies and a sturdy sense of balance.

Other influences helped to amplify this general effect. One was the emphasis on legal knowledge in the academic preparation for the administrative career, though frequently a target for critics favoring, instead, a managerial orientation. Administrative law, in turn, rose to a higher and to a more compelling position in the general course of study required of every one for admission to the bar. Again, the higher civil service came to regard the law of administration as a branch of legal

[10] FRITZ FLEINER, INSTITUTIONEN DES DEUTSCHEN VERWALTUNGSRECHTS (8th ed. 1928). This edition was a model of lucid exposition.

knowledge specifically entrusted to its attention. It was not a matter of tolerable responsiveness to the need for legal counsel once the intrusion of such need into the busy day could no longer be ignored. Rather, the vital precepts of administrative law were absorbed into the thinking as well as the language of the merit bureaucracy itself. Indeed, they turned into a sort of password that made it easy to spot the truly professional man in administrative office.

As a result, the civilizing pressure of administrative law not only transformed raw bureaucratic power into an accountable agency of the community, but also penetrated equally into all of the continuing functions of government. Law and administration came to form a unity. Administrative law merged into the administrative way. This, once more, could hardly have happened if the arm of the law had reached into the utilitarian management of public affairs from the outside, like a cold pike. Happily, the organs of administrative justice, though independent of executive command, were drawing much of their judicial manpower from the ranks of the higher career service.

Administrative courts, for this reason alone, were well equipped for their role. They were arsenals of first-hand knowledge about administration. Such knowledge enabled them, in building up the case law of public management, to do two things simultaneously. One was the alert handling of issues where the individual needed protection but where the pursuit of the common good was not to be blocked categorically. Here the art of sure-handed reconciliation of seeming opposites was at a premium. The other—far more consequential for the entire development—was the prudent practice of supererogation in the theological sense, by molding constructive guidelines for use by the administrative profession in serving the public interest. After all, it was not a simple matter of slapping the hand of the public agency. It was the task of leading it toward that eminently practical goal—a synthesis of utility and legality, of public purpose and limited authority.

Any one could stop the show. But the show must go on—in government, too. What is required, in addition, is that it be a clean professional performance, joining together, within the bounds of legitimate concepts of feasibility, the proper interest of the individual and the ultimately overriding interest of the whole body politic.

IV

In the light of the continental European evolution of governmental institutions, it would seem odd to consider administrative regulation a thing distinguishable from the larger realm of public management. It would seem odder still to give the conduct of regulatory functions distinctive organizational form and to farm out the individual regulatory tasks to self-contained agencies insulated from the departmental system and thus off the highway of executive responsibility. If one were to probe these reactions in search of explanation, the answer likeliest to come forth would be the question: Can one conceive of a relevant difference between regulation and the normal work of administrative agencies?

In exploring the nature of the judicial process, Benjamin Nathan Cardozo found it appropriate to begin by asking himself: What is it that I do when I judge?[11] In its flowering, the school of juridical realism in the United States drew much inspiration from operational perspectives like this. But Cardozo was far from presenting a particular school of legal theory, least that of the realists, who looked for the conceptual essence of law in the behavior of human beings who said that they applied the law. Even so, Cardozo saw good reason to illuminate the judicial function by an examination of what was being done about it in the course of its exercise. What do we discover when we adopt the same point of view toward administrative regulation?

Part of the answer has been given earlier. That answer was to say that to govern is to regulate. But a complete answer carries us farther. A complete answer might begin with the observation that to regulate is, in the first place, to scrutinize meanings. Practically speaking, all administrative regulation functions under the explicit or implicit direction of certain canons, criteria, standards, or policies. This, indeed, is true even as we ascend the steps of authority. Legislatures, far from being freely creative makers of regulatory pronouncements, are under comparable direction—by ideology, public expectancies, constitutional clauses, and the like. Constitutions, in turn, as they meet man's dreams, are bound to borrow from the sacred words of the particular age and often respond to the persistent whisper of ageless influences such as natural law—a great institution, though neither law, strictly speaking, nor in any way related to nature.

The problem of meanings is vital on all these different levels of authority. This is so because dispositional action—action affecting either the public at large or certain limited publics—is characteristically built on derived competence, on jurisdiction as well as functions circumscribed in language binding to the regulatory agency. What it has got to act with is passed down from farther up. To find out what it is requires reference to meanings employed at a higher point.

This consideration by itself does away with the idea that to regulate is to do as one pleases. To be sure, when power is forced into a structure of control, excessive and destructive tightness would develop, save for the immensely beneficial lubricant known as discretion. Generality and specificity, rule and case, must be brought together in a nexus both logical and satisfying in terms of the interests to be served. Here justice cannot afford to be blind. It must be seeing. Discretion is needed to fashion this nexus by working as the eye of justice.

To express it differently, discretion cannot be divorced from its purpose. It is not a three-hour pass to get away from the rule. It is, rather, the flying squad for the rule, to make its presence uniformly felt. Discretion, then, is the means of assuring that no case is dealt with except in relation to the rule, whatever the particular circumstances; and that such particular circumstances do find proper attention when otherwise the rule would turn into a mindless tyrant. That is why con-

[11] See BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1925).

tinental European administrative law has given so much attention to defining the limits of lawful discretion, however "free," and to refining the test of motive as a principal instrument for dividing right from wrong.[12]

Administrative regulation aims at certain results. It seeks to create an institutional product, so to speak—that is, a specified behavior on the part of those being regulated, subject to enforceable public accountability. The primary method in turning out the institutional product of regulation is to haul in the pertinent facts, to analyze and evaluate them, to establish causal relationships as well as the means-end sequences, to spot alternatives of approach—all so as to do promptly and properly what needs to be done, under the agency's mandate. The emphasis is on doing, with the sheltering as well as restraining implication that what is proposed to be done can be justified.

But the business of regulation is not consummated in the act of justification. The latter is inferential to the former, and the lawyer gets into the act only in this inferential context, unless he contributes his skill to devising a sound regulatory line of action. Certainly, in many instances, the adequacy of empirical research on which the eventual decision comes to rest will be more significant for the outcome than purely legal considerations. This fundamental point, it will be recalled, eventually occurred some fifty years ago even to the very obdurate Professor Dicey, despite his profound misgivings about a thing as un-British as *droit administratif*.[13]

What is still more important is that in looking at the methods employed by administrative regulation, we found nothing that could be called exclusive characteristics. Notice of intent and provision for hearing are auxiliary to arriving at a finding. It is the finding that is indispensable. In short, we have come to grips with the essence of the working approach of administration generally, rather than with a specific regulatory procedure, applicable here but nowhere else. In digging up the facts and reaching conclusions in the light of the empirical evidence, regulation does not do anything unfamiliar as part of the normal ways of administration. Nor can one discern any basic distinction in this respect between the fixing of railroad rates and the licensing of atomic reactors, between policing the security market and redressing the balance of payments, between allocating wave lengths and fighting an epidemic, between enforcing requirements of industrial safety and reducing crop surpluses.

In each of these examples, the first step is the accumulation of concrete information, so as to substitute light for obscurity. Next, the picture thus gained must be stripped of controversial features as far as possible. In allowing those being regulated the opportunity of an early challenge, before the last word is said, a useful corrective

[12] On the limits of lawful discretion, as they have evolved in continental European administrative law, see Morstein Marx, *Comparative Administrative Law: A Note on Review of Discretion*, 87 U. PA. L. REV. 954 (1939), *Comparative Administrative Law: Economic Improvisation by Public Authorities*, 88 *id.* at 425 (1940).

[13] ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION foreword (8th ed. 1915).

is introduced. Finally, reasonable safeguards must be provided to infuse into the emerging decision a responsible projection of the common good. The regulators are not meant to be merely negotiators between given interests. The decision is not meant to be merely an exercise in calculating pressures. The interest called general is not merely a mathematical function of special interests as they happen to intrude. That is why the career service needs fortitude as well as perception. But in all of this, again, we encounter simply an outline of how administration works, irrespective of its particular tasks, regulatory or other—or how it ought to work.

These, then, are the perspectives typical of the continental European attitude toward administrative regulation. Concisely put, one may sum it up by saying that to administer is to regulate. The regulatory approach is seen as implicit in the accomplishment of administrative purposes. Redress of regulatory impositions is, therefore, regarded as an incidental aspect in the use of general remedies against unlawful exercise of administrative power. The effectiveness of such remedies had to be assessed over the entire range of administrative functions and in regard to all forms of administrative actions, including those of a regulatory character.

In its most significant expression, pursuit of these generally available remedies, as mentioned earlier, placed the citizen in the care of a specialized judiciary—the administrative courts. As further pointed out before, the administrative courts viewed themselves as being entrusted with a kind of guardianship over both the law of administration and the conduct of administration according to law. The incisive and knowledgeable manner in which this guardianship was exercised helps to explain why, in turn, the internal procedures of administrative agencies came to reflect marked deference to legal requirements. But the sense of adequacy about the state of these internal procedures, especially for dealing with informal complaints, did not lead to a withdrawal into bureaucratic self-sufficiency. It did not dim the recognition that only a system of external review by administrative courts would supply the necessary capstone. Without an outside monitor, and one prepared to show the way, attention to legal guaranties might become slack in the activities of administrative agencies.

In this way, administrative law gained a dual locus. Internal agency procedures addressed themselves to the need for fairness in dealing with members of the public as well as for official accountability. In the last analysis, both served the purpose of keeping the house of administration clean. Appeals were opened up from the field-office level to the regional center and ultimately to the headquarters of a department. As a minimum, on complaint, the judgment of the administrative superior was brought into play. In more elaborate form, examination of the complaint might be a collegial process, perhaps by a three-man body, including representatives of the public, depending on the administrative operations in question. The pattern was not uniform in every detail. Different departments evolved different arrangements. But the concept of a remedial apparatus within the four walls of

administration as an essential element in the discharge of governmental functions was accepted as commonplace.

Manipulation of this apparatus by the aggrieved citizen was made easy. It did not require adherence to a set procedure, with its pitfalls of technicality. A handwritten note or even an oral explanation was enough. The tendency for the administrative agency to find itself in the right upon internal review was counteracted by two important factors. In the first place, the complaint was potentially but the prelude to external reconsideration before the administrative courts, as the next stage. Internal review was, therefore, itself always on trial, as it might have to meet judicial eyes afterward. And secondly, the professional point of view of the administrative cadre translated itself into concern with the efficacy of the department's mode of operations. Complaints were an incentive toward testing once more the bolts and screws so vital for good administrative performance.

Administrative justice, as the sphere of the specialized judiciary, and attention to lawful and responsive procedure within the individual governmental agency, as part of the regular business of public administration, thus represented two different realms. But neither made the other superfluous. Each had its well-defined purpose.

To keep the utilitarian drives generated in administrative agencies firmly in harness, to hold authority within the limits drawn by law, to combat bureaucratic indifference as well as abuse—these were goals that had to be achieved, in the first instance, in the day-by-day operations of thousands of public offices. Yet, it was not enough to acknowledge the conviction that a decent effort was made in most of these offices to practice the maxim of government of laws. Administrative procedure was always in danger of relaxing into an *ex parte* parody of equity. Someone was needed to look in from the outside—one having the right to ask all kinds of questions, to examine all kinds of files, to weigh all kinds of explanations in complete independence from executive or legislative influence.

Separate—and separately necessary—as these two realms continued to be, they were joined by being proving grounds of a single organizing force, the indivisible body of administrative law. Moreover, the connections were reinforced by the human factor. The agency spokesman, for example, might be a more widely renowned authority on certain aspects of administrative law than any member of the panel of judges sitting in a particular case. Again, before being very far along in his career as a higher civil servant, the agency spokesman might be invited to change places. He might be called upon in the process of advancement to don the judicial robe for the remainder of his active years, taking his seat on an administrative court.

The two realms, then, were separate without lacking connections. Indeed, each existed for the other, in a sense. External review through administrative courts bolstered the legal instinct of public management. Conversely, the axiom that administration acquired its status as a civilized activity by proceeding on the path of law tremendously eased the tasks of the administrative courts. Instead of carrying

the whole load, they could afford a selective approach, centered on the building of precedents.

V

Like any body of law, administrative law is not safe from the threat of turning dry and falling dead. Why did continental European administrative law retain its *élan vital* for so long? Why did it continue to furnish administrative regulation a solid foundation even though over the last hundred years the rising industrial society posed always anew strikingly different problems to cope with and singled out ever-expanding fields for regulatory action?

Some of the reasons can be recognized without much difficulty. The early union of function and law, of action and restraint, produced a viable tradition, and one of great adaptability to the novel demands of the emerging service state. That the career man in administration usually brought a juridical sensitivity to bear upon his duties was another factor. That adjudication of conflicts between administrative agencies and private parties was in the hands of courts that knew the ways of officialdom was still another. More fundamentally, perhaps, administrative law gained its social rank by being the pedestal on which the modern merit bureaucracy assumed its posture as an integral element of the equalitarian constitutional order of the twentieth century.

One of the outstanding illustrations of a happy combination of these several factors is the French Council of State, the *Conseil d'Etat*.[14] It is both a central staff agency, especially in advising the cabinet on legislative proposals, and France's supreme administrative court. In this latter capacity, what is perhaps most remarkable is the deft blending of ingredients of competence as well as of procedure. On the first, it must be borne in mind that the Council's staff represents one of the top-ranking *grand corps* of the French civil service. Competition for entrance has long been vigorous. In gaining admission, juridical skill and administrative promise have traditionally been at a premium. It is quite common for the leading spirits in the Council of State to gain a place among the living authorities on *droit administratif*—unless they find it more fascinating to write on truly eternal subjects exemplified by young Léon Blum's *Le mariage*.

As one of the oddities of the reform measures adopted after World War II, legal training is now no longer required for entrance. This change was brought on by the establishment of the National School of Administration. The highest graduates of the exacting three-year course offered under auspices of the National School are privileged to knock at the door of the *Conseil d'Etat* without having delved far into administrative law. But the Council has quietly overcome this anomaly. In such case, an unofficial tutorial grooming will be provided by a designated legally trained

[14] Perhaps the best English introduction into the work of the *Conseil d'Etat* is C. J. HAMSON, EXECUTIVE DISCRETION AND JUDICIAL CONTROL: AN ASPECT OF THE FRENCH CONSEIL D'ETAT (1954). See also BRIAN CHAPMAN, THE PROFESSION OF GOVERNMENT (1959). For a good concise statement, see Langrod, *The French Council of State: Its Role in the Formulation and Implementation of Administrative Law*, 49 AM. POL. SCI. REV. 673 (1955).

staff member to close the gap. The results thus far, it must be admitted, are quite impressive.

It is hardly surprising that during the past 160 years the talent available in the Council has been drawn upon frequently. Staff members have been given a great variety of special assignments. These have led some into key posts of colonial administration and into other positions of an executive character. Moreover, members may go on the inactive list and remain there while serving, for instance, as elected deputies or in international bodies. It may be recalled that President De Gaulle's durable prime minister, Michel Debré, is a senior staff member of the *Conseil d'Etat*.

More frequent are short-term assignments, by official designation. These may consist of unraveling a difficult administrative situation in or out of Paris, presiding over eminent-domain proceedings for a controversial public project, carrying on delicate negotiations involving French interests in some foreign capital, or chairing a fact-finding body to sift a cluster of unpopular proposals. Much official experience is thus constantly being carried back into the judicial role of the Council of State.

Equally substantial are the procedural resources of the *Conseil d'Etat*. In its inner workings, one observes an intertwining of different mechanisms of scrutiny. Normally, the weeding out of the governing facts of every case up on appeal is entrusted to a reporter. It is his task to see to it that at no stage in the disposition of the case questions of fact arise that cannot be answered on the record he has assembled. The reporting task is completed with the concise exposition of all that is factually relevant before the section concerned with the case—a number of individuals sufficiently large to allow for diversity of personalities as well as of points of view.

The weight of the analytical job of penetrating into the legal issues raised by the case falls to the governmental commissary. He is normally a tower of juridical strength, a man of authority and encyclopedic knowledge, often esteemed both within and without the *Conseil d'Etat*. His task is to draw out the hidden implications, to reflect upon the series of applicable precedents, and to lay out the bricks and straws of a proposed decision. Again, this is done before the assembled section meeting in public. Needless to say, it does not matter that the visible public is less than all of Paris. It may consist, in fact, of no more than half a dozen individuals, including the inevitable old man who throughout the proceedings remains buried in his newspaper, turning the pages with unseemly rustling. The self-discipline emanating from a public proceeding is, nevertheless, present.

But there are still other roles in the review process that need to be sketched in. An important role is played by the president of the section, also mostly a great name. Although normally quietly attentive, he may have reason to invite clarification of particular points. Nor do things necessarily end in the section. Whenever there is need for it, especially in order to reconcile different views of different sections,

a still larger forum is supplied in the form of a joint meeting of several sections or of the plenary session of the entire membership of the *Conseil d'Etat.*

In the operation of this machinery, one perceives an acknowledgment of the dimension of time. The Council, in pronouncing itself on what is law today, reaches back to what it found to be law in the past. Where it encounters a fork in the road, it also speculates about the likely requirements of the future. What is still more important, in the process of committing itself, the Council searches cautiously for the concert of minds in its midst. It strains to hear many voices rather than a single melody.

Individual responsibility and group responsibility are intermingled without stifling either. The tone of the proceedings is one of free inquiry, unburdened by disproportionate considerations of protocol, seniority, or prestige. For an old institution, this is cogent evidence of a youthful disposition, toward which René Cassin, the young old man so long at the helm of the Council, has made a great contribution. As a result of all these factors, what comes out of the *Conseil d'Etat* can well be called an embodiment of collective energies. It is representative of the spirit of the institution rather than of any one dominant mind.

Two additional points deserve mention. In the first place, despite the standing they enjoy, members of the *Conseil d'Etat* do not have individual offices, nor even working cubicles, a discomfort not as outrageous as it might appear to be to Americans when it is recalled that members of the British House of Commons are equally disadvantaged. Only the head of the *Conseil d'Etat,* designated as vice president under a nominal presidency, has his own office. On the other hand, it is obvious that for the same reason no staff member can hide within the institutional body itself. He cannot withdraw from his colleagues, except by working at home. When he is at the office, he does his work in the reasonably spacious library with heavily loaded shelves.

It is here that professional consultation takes place in whispered conversations that may go on for considerable time. It is here that ambiguities in legal clauses and past decisions are sounded out and fine points of meaning are argued soberly. With but slight exaggeration, one may say that the mind of the *Conseil d'Etat* is being made up in the library. The principal means are an exchange of views among colleagues and quiet study of the printed page, file materials, or some draft paragraphs, usually still handwritten. In a sense, the Council is engaged in a perpetual conference.

Secondly, to stimulate among the membership of the *Conseil d'Etat* a comprehension of the many different questions coming up simultaneously before its several sections, a system of documentation has been built up. Case summaries and section agendas are prepared, which each member finds in his mail tray as he proceeds to the library. In this manner, an institutional mirror is held before the entire staff. Intellectual participation in what is going on at various points in the Palais Royal, the Council's nobly creaky quarters, is thus encouraged. The men and women in

the service of the Council see about them not the impassive hauteur of abstract justice, but a breathing manifestation of law for all.

Here, then, is the vignette of a great administrative court. Perhaps its best self-portrait can be found in the ornate *Livre Jubilaire*[15] commemorating, a decade ago, the 150th anniversary of the Council's postrevolutionary reincarnation. Napoleon once said to one of his intimates that he never tired of taking his seat among the members of the *Conseil d'Etat,* even immediately upon return from a theater of war, because it was exciting to him to match his intelligence against the best minds of France and to find himself scoring well. It is this intellectual heritage that has fitted the Council for its historic mission as the molder of the law of administration and as the watchdog over arbitrary power—even under the first empire, even under Pétain.

To keep administrative justice an intellectual force as well as an agency of order and accountability has been recognized as a demand of necessity outside France as well. In Germany, for example, the link between the academic profession and the administrative courts has been a matter of tradition. The very concept of a specialized judiciary was picked up at an early date and carried forward toward practical application by political scientists as well as by teachers of public law. Juridical scholarship went far to open the terrain to the operations of administrative courts. It scraped the basic concepts clean, converted rulings into rules, and proceeded to erect a systematically arranged body of administrative law.

One beneficial effect was that the specialized judiciary was spared a great deal of agonized groping. Another effect was that the developing law of administration, though built up decision by decision, case by case, evolved a sense of inner coherence. It strove toward a grand design. In consequence, administrative law became greatly more teachable academically, thus progressively becoming more refinable. But the academic teacher was not only the instructor of his students. He also taught the practitioners of the administrative arts when reaching outside the lecture hall, especially as the author of treatises, monographs, and other professional writings. To a larger extent perhaps than most other fields of legal knowledge, administrative law invited methodical exposition. The great texts tended to be systems rather than compilations. They grouped the particulars and reached for the whole.

The fact that here, for once, the national context was less relevant left its imprint, too. Administrative law was a continental European common law, as it were. Intellectual interchange was thus made vastly simpler. In this respect, the Dane spoke the same language as the Argentinian, the Vietnamese the same as the Algerian. Many of the best-known works in the field reflected experience drawn from different areas. The classic example, no doubt, is the treatment of *Verwaltungsrecht* from the pen of Otto Mayer. Here was a man so endowed as to be unusually suc-

[15] LE CONSEIL D'ETAT, LIVRE JUBILAIRE (1952). The almost 700 closely-packed pages of this volume also contain a substantial section devoted to the influence of *droit administratif* on other parts of the world.

cessful in forming a link between Germany and France. But Professor Mayer saw more than a joint interest and an identical outlook upon the danger of untamed power. He also recognized, earlier than others, that administrative law, in the day of positive government, was bound to become the prime instrument of the industrial society. After the first World War, when the political institutions of Europe had been drastically revised by history, Mayer remarked with uncanny astuteness in the introduction to the new edition of his book: "Constitutional law vanishes, administrative law remains."[16]

The German academic teacher, moreover, was not merely an organizer and an intermediary of knowledge. He was also pulled directly into the work of the administrative courts by combining the freedom of scholarship with service on the bench. While being made to give, he was allowed to take. Theory had its feet pulled down to the ground, and practice was not allowed to stagnate. Not all great teachers are great judges, but judges benefit from intermittent seminars in chambers. Tough thinking strengthens the sinews of justice.

This must suffice to delineate our subject. The institutional outline should be clear. What needs to be added is that the clarifying effect of an outline stems always in part from the bold strokes with which it is set forth. We have drawn a type, in a sense. But such is the perversity of human nature that it never tires of contradicting the typical. Hence, it is obvious that the type is continuously cut into and thus distorted by innumerable individual actions running counter to it. Moreover, to draw a type is not to claim perfection. As we said at the outset, each institutional characteristic provokes its variants. Ultimate appraisal of what presents itself as a type has to be in terms of varying degrees of the type's own self-fulfillment.

Granting all that, much is left to reflect upon. Culture patterns, it is true, do not encourage transplantations. To compare contains no commitment toward exchange. It does add a new brightness to the familiar. It may suggest a new direction in which to advance reconnaissance. It may prompt a turn of mind.

[16] OTTO MAYER, DEUTSCHES VERWALTUNGSRECHT (1924).

THE REGULATORY PROCESS: A FRAMEWORK FOR ANALYSIS

MARVER H. BERNSTEIN*

The literature of administrative regulation in the United States, as it has developed over a period of several decades, yields an inadequate and distorted conception of the regulatory process. Most lawyers have tended to consider governmental regulation of economic enterprise within the framework of legal theory, while administrators and students of administration have tended to analyze regulatory activity in terms of the conventional categories of governmental administration. These divergent attitudes toward government regulation are based on different sets of values, assumptions, objectives, and professional training. Areas of agreement have not been staked out; significant differences in the consequences of the approaches have not been identified. Applications of each approach have been charged with value judgments whose premises have rarely been examined and tested. One result has been the tendency, on both sides, to show more interest in what ought to be taking place in regulatory administration than in what goes on.

Although the literature of the regulatory process has concentrated on technical and procedural issues presented in the professional jargons of the lawyer and the administrative expert, the modern debate over the reform of administrative regulation has been part of and a major expression of the contemporary debate on the role of government in industrial society. Since the creation in 1933 of a special committee on administrative law by the American Bar Association, battle lines have been drawn between bureaucrats and defenders of liberty, between fighters for social change and protectors of privilege, between administrative absolutists and believers in a government of laws and not of men. At stake in these legislative struggles over "administrative procedure" have been such fundamental issues as the proper scope of the government's role in economic life, the appropriate limits to the growth in administrative discretion, and the conditions under which increasing governmental activity affecting economic life would be tolerated or accepted.

The primary characteristics of the literature of administrative regulation need only be summarized here. Research and discussion have focused heavily upon adjudicatory procedures and the administrative structure of the independent regulatory commission. The regulatory programs of departments and agencies other than independent commissions have received scant attention from reformers or scholars. Similarly, most studies have concentrated upon adversary proceedings,

* A.B., A.M. 1940, University of Wisconsin; Ph.D. in Politics 1948, Princeton University. Professor of Politics, Princeton University. Member, Organizing Committee, President's Conference on Administrative Procedure, 1960; Associate Staff Director, Special Committee on Federal Conflict-of-Interest Laws, Association of the Bar of the City of New York, 1958-60. Author, REGULATING BUSINESS BY INDEPENDENT COMMISSION (1955), THE JOB OF THE FEDERAL EXECUTIVE (1958). Contributor to professional periodicals.

both within the agencies and the courts. This emphasis has diverted attention from such important processes of administrative regulation as negotiated orders, investigations, selection of cases to institute, administrative determinations, enforcement and compliance activities, and other activities that do not involve overt adversary proceedings. As a consequence, differences between "regulatory" and other types of administrative activities of government have probably been exaggerated.

The addiction to the adversary process and the deference accorded private rights and privileges have not been matched by any comparable attention to substantive issues of public policy. The effects of regulatory policy and operations on the regulated interest and on consumers have rarely been studied. Very limited use has been made of economic analysis in reviewing and appraising regulatory policy or in determining what conditions regulatory agencies should investigate, whether violations of law have taken place, and what to write into orders. The lack of empirical work has extended even into areas of major concern to lawyers, such as the functions and role of hearing examiners and relations between agency heads and hearing examiners.

As current discussions of "delay" as the number-one problem of the regulatory commissions indicate, the literature exhibits predilection for treating symptoms rather than basic causes of ineffectiveness in regulation. Chronic reform proposals, such as those relating to administrative courts, seem to emerge not from fresh analyses of problems and issues, but from *a priori* premises about advantages claimed for courts and judges over agencies and their heads in the dispensation of justice. The assumption of expertise, supposedly an inherent advantage of regulation by commission, has not been tested empirically, although a running tide of harsh criticism of the staffs and heads of regulatory commissions has become commonplace in political life.

Policy-making processes in regulatory agencies have scarcely been studied, and the forces influencing policy-making have not been identified in specific regulatory programs. Little concern for the political context of regulation has been demonstrated. The temptation to rely heavily on form—the structure of an organization, uniform procedures of adjudication, the constitutional role of the President—has been powerful. The inability to come to terms with the political character of regulation has been glorified as an honorable escape from politics, and it has sanctified the drive toward further judicialization of administrative regulation. Finally, in the reformist orientation, distinctions between ongoing regulatory activities and prescriptions for improvement have been obscured, perhaps largely because felt needs to supply formulas for reform have outrun the available empirical data on the political and technical setting of a particular regulatory program.

I

CATEGORIES OF ANALYSIS

One condition underlies the diagnostic and prescriptive aspects of the literature of the regulatory process. This condition is a failure in analysis that has warped our

conception of the regulatory process, encouraged us to rely excessively on minor and somewhat dubious technical reform measures to achieve or obstruct major changes in regulatory policy, and enabled us to avoid discussion of policy considerations. The failure in analysis seems to stem principally from a reliance on untested classifications and dichotomies that bear little or no relation to regulatory operations.

A. Separation of Powers

The most prominent categories in the literature of regulation have been legal in origin and application. The tripartite division of powers—legislative, executive, and judicial—has been of great import. However, the work of the regulatory agencies—departments and commissions—has not fitted conveniently into these categories of separation of powers. Many modern institutions were developed because many types of regulations established and enforced by the three traditional branches of government were not effective. The origin of many commissions was based partly on the premise that the separate functions had to be closely coordinated by men of experience and expertise. Yet, much of the analysis of the work of the agencies has been premised on the desire to insulate the three powers from each other in keeping with historic tradition. Given this premise, there has not been a satisfactory synthesis of the desires for more effective regulation, for promoting impartial equity for the individual, and for avoiding overconcentration of power in the hands of individuals. Categories drawn from theory and practice of separation of powers have been utilized not as tools to analyze regulatory operations, but as verbal support for continuing judicialization of the regulatory process.

B. Rule-Making vs. Adjudication

Another important set of categories, the dichotomy of rule-making and adjudication, has been an offshoot of the basic structure of three separate powers. These categories have not furnished a constructive basis for the examination of the workings of the regulatory process. Rule-making has been identified with policy formulation, while adjudication has been defined as the process of deciding individual cases. Some observers and practitioners find a conflict between policy-making and adjudication that arises from profound differences in attitude and procedure. Labeled a legislative function, policy-making, it is said, is formulated normally on the basis of extensive and informal interchanges between regulatory agencies and interested parties and delegation of work from agency heads to staffs. Judicial hearings, so the analysis runs, are not appropriate ingredients of rule-making or policy-making.

In sharp contrast, however, adjudication has been conceived as a process that depends on formalized procedures, the creation of a record with adequate opportunity for presentation and cross-examination of evidence, and final judgment on the basis of the record alone by the persons responsible for decision.[1]

[1] See, *e.g.*, Hector, *Problems of the CAB and the Independent Regulatory Commissions*, 69 YALE L.J. 931 (1960) [this report has been published as a committee print by the Senate Committee on Government Organization, 86th Cong., 2d Sess. (1960)].

The distinction between the legislative-executive function of formulating policy and the judicial function of deciding individual cases lies at the root of reform proposals that would surgically cut off the adjudicative function from the policy function. The basic notion has appealed, from time to time, not only to those who hope to diminish administrative discretion and coercive power in the hands of administrators, but also to those who would make more effective use of regulatory agencies for policy purposes that may enlarge the scope of governmental power. Despite a good deal of initial enthusiasm in support of these proposals, their staying power has been rather weak. The withering away of support for these schemes of dismemberment may be accounted for in part by the uncertainties surrounding the probable attitudes of judges of administrative courts toward agency policies. Perhaps judges might, over time, become quite sympathetic to the policy problems of the agencies with whom they deal on a continuing basis.

Sympathy for such objectives as eliminating delays in reaching decisions, promoting fairness and objectivity in the adjudicative process, and tooling up the agencies to administer their affairs more vigorously should not lead to uncritical acceptance of the dichotomy between rule-making and adjudication. The major difficulty is simply stated: the categories of rule-making and adjudication, which can be applied in a limited way to distinguish the end products of administrative regulation—namely, rules and orders—often cannot be meaningfully applied to the operating processes by which rules and orders are produced. Two major factors account for the intermixture of broad policy-formulation and decision-making in individual cases. The first is the manifest difficulty in many instances of formulating a guiding policy in advance of the consideration of individual cases because the issues involved are highly complex and controversial, or involve matters that remain substantially unresolved by existing legislation. The second factor is that many policies cannot be determined or ought not to be decided except in connection with the processing of specific cases of adjudication.

The distinction between rule-making (policy-making) and adjudication can rarely be translated into regulatory operations as long as critical interests are at stake in a case under adjudication. Each case may confront such a clash of interests that only a vague policy, or none at all, emerges from the individual case decision. When policies are broad and vague, they generally prove to be unsatisfactory guides to decision in adjudicated cases. And when policies are too tight and specific, they may be applicable only to relatively few cases. What is needed is an appropriate balance between the two extremes in order to utilize rules as effective policy guides to adjudicators and to make adjudicatory decisions more productive of usable policy guides. While the temptation to avoid policy-formulation is endemic in regulatory agencies, it must also be recognized that the obstacles to policy-planning and formulation are powerful in many regulatory settings. Indeed, the most insistent line of criticism directed at regulatory agencies that handle large volumes of adjudicated cases is their marked incapacity to plan their operations and formulate

guiding policy. But it is neither certain nor probable that policy functions would be carried on more effectively by regulatory agencies deprived of jurisdiction over adjudication.

C. Regulation vs. Promotion

A popular classification in the literature of administrative regulation attempts to distinguish between programs that regulate and those that promote business enterprise. Regulation, it is claimed, differs distinctively from promotion in several respects. It is argued that regulation is administered optimally by independent multiheaded commissions rather than by departments or other types of agencies; it is carried out by specialized operations of rule-making and adjudication that are distinctively different from so-called executive-type and other administrative operations; and its integrity can be maintained only by separating it sharply from programs that promote private business activity. It is also widely held that regulatory programs require for effective administration more continuity of direction and more permanence and consistency in policy-development than do other types of government programs. Associated closely with these desiderata is the belief that regulation requires a quality of professionalism and expertness of judgment that is higher than that of nonregulatory operations and is safeguarded against the viscissitudes of politics and the varying tempers of changing presidential administrations. This attitude is reflected, for example, in the opinion of the Board of Investigation and Research in 1944 on transport regulation:[2]

> To place rate regulation in the hands of an executive officer would be to move . . . toward politics rather than away, to diminish that protection from partisanship which is desirable.

Regulation, moreover, has generally been conceived to be a narrow, self-contained process more or less separable from the main drift of national economic policies. This insular conception of regulation has been paid continuing lip service despite increasing recognition that some regulatory policies should be closely integrated with other governmental programs in order to maximize their effectiveness. As a conceptual tool of analysis, the dichotomy of regulation and promotion provides a built-in bias that supports a narrow, mechanistic view of the regulatory process, focuses attention on judicial functions of regulatory agencies, and unduly discounts the need for political leadership to protect the integrity of a regulatory program.

From an analytical point of view, three criticisms should be noted. First of all, there is remarkably little empirical evidence in the public documents and the research literature in support of the dichotomy of regulation and promotion, and some evidence opposing it. Second, there is some evidence suggesting that the separability of regulation from promotion varies according to the nature of the regulatory program. For example, where the dominant or exclusive purpose of public regulation of business is protection of public health and safety, as in the case of the Atomic

[2] Board of Investigation and Research, *Practices and Procedures of Governmental Control*, H.R. Doc. No. 678, 78th Cong., 2d Sess. 141 (1944).

Energy Commission and the National Institutes of Health, a close identity of interest tends to develop between the agency's conception of the public interest and the individual firm's business interest. No firm wants to construct an unsafe nuclear reactor or market an unsafe vaccine. Moreover, when the state of technology in a regulated enterprise is unstable, rapidly changing, and relatively untested, the dividing line between regulation and promotion may be obscured, if not eliminated.

Lastly, regulation of practices in one industry may seriously affect the conduct of others as well. Subsidies available to one form of transportation may adversely affect those media not eligible for public assistance. What is regulatory with respect to one industry may be promotional in its impact on another. And regulations enforced by one agency may effectively nullify the promotional efforts of another agency.[3]

D. Commissions vs. Noncommissions

As noted already, a major distinction has been made in the literature between commissions and other types of administrative structures, together with the insistent view that the commission is the ideal-type structure for regulatory programs. The contrasts commonly drawn between commissions and other agencies have not been documented in depth. Diversity among regulatory programs in commissions has been glossed over. Empirical data is lacking to support widely held contentions that the relationship of commissions to congressional committees is characteristically different from that of other agencies to congressional committees. While multiple direction of commissions has been expounded as a better guarantor of fairness, sound judgment, and continuity of policy than single-headed direction is said to be, commissions appear to have encountered more and sharper criticism of regulatory policy and procedure from all sources than have the executive departments as a group.

One important difference between commissions and other agencies suggested by recent political experience is the finding that modern presidents have tended to accord appointments to commissions a relatively low priority. They have given little consideration to the appointment of men who might increase the internal strength of commissions.[4] If the quality of commissioner appointments has tended

[3] A former member of the Federal Maritime Commission commented: "Today the Government regulates transportation by promoting transportation, and by promoting it, the Government actively regulates it. *The time has come to cease treating regulation and promotion as though they were separate and distinct.* I not only believe that they overlap, but that in fact it is impossible to tell where one begins and the other ends. Transportation facts and realities have wiped out the dividing line. We can continue, for convenience's sake, the loose use of the term *regulation* when we primarily think of *restricting* the activities of carriers, although restricting one carrier, or group of carriers, protects and promotes others; or when we think of *rate* regulation, although more often than not approval of low rates is intended to promote his competitive status. We may think of *promotion* as doing something for a *carrier,* such as payment of subsidies; yet keeping competition from him by regulation may promote a carrier as much, or more, than a subsidy, while denying a carrier promotion through a subsidy may mean *restricting* him as effectively as through *regulation.*" From memorandum of Raymond S. McKeough, p. 5-6, commenting on SECRETARY OF COMMERCE, A REPORT TO THE PRESIDENT: ISSUES INVOLVED IN A UNIFIED AND COORDINATED FEDERAL PROGRAM FOR TRANSPORTATION (1950).

[4] As James M. Landis stated: ". . . I have stressed the lack of concern in the last decade in the office of the President with manning these agencies with personnel of high competence and great

to run below that of other agency heads, the difference runs directly contrary to a major expectation supporting the theory of the independent commission.

E. Conceptual Inadequacy of the Categories

The categories under review here have been the principal conceptual tools available for analysis of the regulatory process. They have not made affirmative contributions to the analysis of what happens in regulatory operations. Their major use has been to provide a basis of objection to what takes place because it does not fit the categories. They have limited the analysis of the multifarious means for developing policy. They have not been applicable to the extensive use of administrative techniques of negotiation, discussion, and consent that have developed in almost all regulatory programs in response to the practical needs of the times. They have failed to study and account for many administrative and ministerial operations by regulatory agencies that have been followed on a practical basis with widespread acceptance. Almost no attention has been given to alternatives to formal hearings as devices for the participation of interested parties. Methods of regulation other than formal adjudication remain largely the private knowledge of direct participants in the regulatory process.

Similarly, these classifications have focused not only on policy considerations and goals of public policy, but rather upon mechanistic concerns. Regulatory activities are appraised customarily not in terms of their impact on regulated interests or their contribution to policy goals, but rather in terms of such factors as average processing time for cases of adjudication, whether commissioners write their own opinions, or the degree of separation between examiner and his employing agency. In their preoccupation with procedure and organization, these categories of analysis have helped to divert attention from the underlying issues and checked the progressive development of public policies.

II

THE NEED FOR EMPIRICAL WORK

Whatever utilities the dominant slogans and theologies of administrative regulation may have had for resisting policy change or for proposing limited organization changes, they have contributed neither a realistic understanding of the nature of the regulatory process nor a fresh approach to the major problems of regulatory policy in particular fields. One conclusion emerges from a review of the characteristics of the literature and the dominant categories of analysis of the regulatory process: there is a critical need to overcome the conspicuous shortage of empirical studies of regulatory operations, policy issues, and regulatory results. Without the knowledge and stimulation that empirical research might provide, we are likely to remain on dead center in our understanding of the regulatory process and in our prescriptions for reform.

quality. . . ." From interview with James M. Landis, *What's Right and What's Wrong With Government Regulation*, U.S. News and World Report, March 27, 1961, p. 83.

The need for empirical work lies in three intimately related areas. Perhaps the task of highest priority is the critical need for conceptual tools of analysis to evolve a more comprehensive concept of the regulatory process with an orientation toward policy and processes of policy-formulation. Only through imaginative empirical work are we likely to acquire the raw material for developing such tools. A second task is the formulation of appropriate levels of generalization that will enable scholars and practitioners to comprehend the rich diversity of regulatory operations and experience in the federal government and elsewhere. It requires the formulation of generalizing hypotheses that are subjected to empirical testing. Empirical work is also needed to identify the most productive methodologies for carrying on research into operations and for evaluating policy developments.

A. Categories of Analysis

The starting point in the development of an improved conception of the regulatory process is the formulation of categories of analysis that grow out of operations of regulatory agencies. The task must be premised on the appreciation of the enormous diversity among regulatory agencies and programs. It may be possible, for example, to develop a classification of regulatory programs in terms of functional goals that would, in the first instance, recognize known differences in existing programs. Several types of regulatory programs might be differentiated in this way:

1. *Public utility programs that embrace relatively comprehensive controls over an industry in which competitive forces are inapplicable or tend to produce destructive or otherwise adverse consequences*

Such programs may, potentially or actually, bite deeply into the management of individual firms in exercising some measure of control over rates, the quantity and quality of service, consumer relationships, safe performance, financial structure, and engineering soundness. They may also exercise strategic control over entry into and abandonment of a business. Such programs present the highest degree of governmental involvement in privately managed enterprises and theoretically maximize opportunities for controversy between regulators and regulated firms.

2. *Safety-oriented programs in which the protection of public safety is the sole or overriding goal of public policy*

While such programs may lead to intensive governmental involvement in an industry or individual firm, as in the case today of the regulation of nuclear reactors by the Atomic Energy Commission, they may often take advantage of a clearer and more widely accepted policy goal and a close measure of agreement between regulators and regulated on the nature of the public interest.

3. *Financial programs that focus on the goal of protecting the integrity of the fiduciary relationship between financial institutions and the public*

The traditional activities of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Federal Reserve System, and the Home Loan Bank Board are examples. There tends to be a high degree of acceptance of regulation by

the regulated institutions, perhaps in part because of the promotional value to those institutions of receiving a federal stamp of approval of their probity and managerial soundness.

4. *Programs incidental to the ministerial operations of the government and the management of public property*

These programs may, in their limited areas of operation, vest in the government a high level of discretionary power comparable to that possessed by managers of private business. They may, however, provide a strategic control that goes beyond the control of internal governmental housekeeping. For example, in its control of the use and disposition of the public domain, as in the minerals-leasing program of the Department of the Interior, the Government may exercise, actually or potentially, considerable control over those authorized under stated conditions to use or exploit public property.

5. *Rather specialized industry-oriented programs, undertaken often at the behest of private parties to stabilize the industry or some of its aspects*

For example, under the Perishable Agricultural Commodities Act,[5] the Department of Agriculture adjusts and umpires disputes between shippers and receivers of fruits and vegetables. In this program, because of the danger of rapid deterioration of the produce, a process of quick adjustment made more or less on the spot seems to offer the greatest measure of protection for both shippers and receivers. Here, the government regulators may be offering essentially a service that the industry itself is unable to supply or can supply only under less convenient or less advantageous circumstances. In such programs, limited goals of public policy may be widely or even enthusiastically embraced by the limited private interests involved, and the process of regulation may feature operating methods far removed from formal processes of rule-making and adjudication.

6. *Programs designed to maintain a balance, loosely defined in statutes and administrative orders, between economic groups, such as relations between labor and management, or between securities dealers and investors*

Acceptability of policy goals may range from broad consent to bitter controversy and, within any single area of regulation, is likely to vary over time.

7. *Programs designed to stimulate or enforce competitive conditions in the marketplace, such as the antitrust program of the Department of Justice and the antimonopoly activities of the Federal Trade Commission*

It may be useful to make a distinction between regulatory programs that establish certain minimal conditions affecting the level of competition and those that strive to eliminate restraints of trade or monopolizing activities. An example of the former might be the labeling programs and prohibitions against false and misleading advertising in the FTC, in contrast to the FTC's activities to prevent mergers that tend to restrain trade or tend toward monopoly.

No claim is made that the suggested classification of regulatory programs, roughly

[5] 46 Stat. 531 (1930), 7 U.S.C. §§ 499a-499r (1958).

according to policy goals, accommodates all existing regulatory programs or identifies the most significant differentiating characteristics of the range of such programs. Certainly, other types of classifications need to be formulated and tested. For example, for some purposes, it may be helpful to classify these programs according to their degree of promotional content, or their utilization of incentives to develop consent and stimulate compliance, or their relative insularity as opposed to their relationship to other governmental programs and public policies. For some purposes, such variable factors as the state of technology in a regulated industry or the character of the regulated industry (numbers of firms, degree of concentration of output and financial control, significance of competitive forces, etc.) may be useful tools of analysis.

To put the matter in its broadest and most challenging scope, we need a typology of regulatory situations that encompasses the variables relevant to the policy goals and operations of regulatory programs. It should probably include such factors as organization structure; political sensitivity of policy issues; the relative importance and use of adjudication and formal rule-making processes; the utilization of negotiating devices and other conventional administrative methods; degrees of discretion exercised by various levels and types of agency personnel; the relative autonomy or interdependence of regulatory programs; the nature and role of interest groups; the structure and character of regulated firms and industries; the significance of political leadership in maintaining progressive revision of goals and policies and in molding the character of regulatory programs; the nature of congressional involvement and concern; the role of catastrophe and crisis in stimulating and crystalizing demands for policy revision; and the impact of international considerations on the formulation of policy.

B. Levels of Generalization

Closely related to the task of formulating categories of analysis is the development of meaningful generalizations. Without such categories, the potential for generalization is very meager. But generalizations are not magically conjured up from the categories. The possibility of developing usable categories and generalizations by a series of successive approximations is suggested.

It should be possible to develop some analytical categories that seem to fit the operating characteristics and processes of a particular regulatory program. For example, through empirical analysis, the researcher can discover whether a particular program is a public-utility-type program or whether it can be classified more appropriately some other way. It should be feasible to develop sets of categories for programs of the same general functional type.

A second step might call for a closer analysis of the categories developed for each of several functionally similar programs—for example, two or three programs of financial regulation, or a group of public-utility-type programs. In this way, it is likely that one set of categories might be formulated to apply across the board to all programs of a particular functional type.

A third step may be a combination of various types of programs into a single classification for which a single set of categories may be developed out of the empirical data of operations. Obviously the combination of functional types of programs would necessarily be not quite as close as the combination of programs indicated in the second step.

Once satisfactory categories of analysis are established, it may be possible to examine various combinations of variable factors that seem to produce an observable regulatory result. In this way, relationships among variable factors may be suggested that may, in the long run, make it possible to offer some predictive suggestions about the operating characteristics and effective performance of a given program. It is likely that only through such successive steps may levels of generalization be developed that will have substantial interpretative and predictive value.

C. Policy-Formulation and the Probing of Policy Issues

Hand in hand with the effort to develop an analytical synthesis of the regulatory process must proceed the probing of policy issues. For this purpose, an emphasis on a regulatory program rather than its administrative instrument appears to be practicable. Again, two related efforts seem to be required that do not exclude due process or managerial considerations and draw substantially on a study of the economic background and effects of policies. The first emphasizes the process of policy-development, the heart of administrative regulation. The second is the evaluation of policies and the prescription of alternatives.

In explorations of policy-formulation, a number of emphases or approaches may be suggested. Analyses are needed of the characteristics of the several aspects of policy-formulation: legislation, rule-making, adjudication, selection of cases, negotiation, investigation, administrative determination, inquiries for planning purposes, enforcement and compliance activities, appraisal of performance and regulatory effects, defending the jurisdiction and vested interests of the program, public information activities, and so forth.

In addition, a better understanding is needed of the conditions that tend to favor and those that inhibit and frustrate policy-development. More needs to be known about the significance for policy-formulation of such factors as technological change, the impact of crisis and catastrophe, industrial structure, political leadership, the input of economic analysis, the public's perception of the need for policy change, and the capacities of private parties to obstruct change or to convert public policy to their own uses. Such studies may be helpful in accounting in more specific terms for the traditonal lag in policy-development behind technological and economic change. They may also be able to throw some light on the problem of making case-by-case adjudication more productive of policy-formulation and policy-declaration. Perhaps special attention might well be accorded those regulatory programs in which the regulators make decisions that create or destroy enormous financial equities of private parties. We need to know whether any governmental agency can

function effectively over time in an atmopshere of unbridled warfare among competing applicants for a single available operating permit worth millions of dollars. We also need to know whether the infusion of some elements of competition into a regulated industry tends to make the regulatory program not only more manageable by the agency, but more effective in reaching stated goals of public policy. We would find it helpful to know whether continuing judicialization of regulatory operations has, in turn, stimulated a search by both businessmen and agency personnel to find less time-consuming ways of reaching decisions.

In turning from analytical studies of processes of policy-formulation in specific regulatory contexts to the evaluation of regulatory policies, extraordinary difficulties may well be encountered, but they ought to be faced. Three problems illustrate the analytical complexity of the task. First, the cause-and-effect relationship between agency activities and policies on the one hand and the condition of the regulated industry may be extremely difficult to establish in the light of available knowledge and data. Second, the goals of regulation are likely to be least articulated and accepted in those programs involving the highest measure of controversy and current public concern; standards of evaluation do not readily emerge from statutes, legislative histories, and administrative decisions. And third, many regulatory programs are not self-contained, but spill over into related areas of program and policy. For example, evaluation of the impact of Interstate Commerce Commission regulation on interstate truckers may not be feasible without considering the impact on trucking not only of the work of the Bureau of Motor Carriers, but also of other parts of the ICC and the programs administered in several other agencies, including boards, semi-autonomous commissions, departmental agencies, and noncabinet agencies.

In the light of these complexities, the analyst may have to settle often for something less than a wholly objective and scientific evaluation of regulatory policies. Nevertheless, if the limitations are fully acknowledged, useful contributions may be made. For example, it may be possible to adduce persuasive evidence that the achievement of policy goals will be more closely approximated through the provision of incentives that stimulate compliance with regulatory standards.

The imaginative development of policy alternatives that face squarely up to current obstacles to effective performance can be seen perhaps most clearly in the field of television and broadcasting. The way forward in this field would seem to lie not in further exhortation of Federal Communications Commissioners to *plan* policies, *be consistent* in applying standards in disposing of multiple applications for single frequencies, or *be bold* in stating a guiding policy on the relevance of program performance of licensees in proceedings for the renewal of licenses. Rather it would appear to be more fruitful to attempt a new approach toward policy that might overcome difficulties inherent in present policies.

D. The Political Context of Regulation

While the legal profession has remained more or less steadfast to the judicial model in appraising and reforming regulation, the fraternity of political scientists

and public administration experts has increasingly accepted the finding that regulation is a political process. "Politics" is now rightly viewed not only as unavoidable, but as essential to the formulation of policies that bear some rational relation to economic and technological conditions. As one scholarly study concludes:[6]

> The mentality which disdains "politics" and strives for a neutral and technical perfection rejects the very solvents that would reduce the obstructions.

Remarkably little empirical work has been done to describe and analyze the political context of particular regulatory programs. To illustrate: the administrative branch of the literature has freely generalized that regulated interests have been adept in capturing control of the regulators. The generalization gains some credence partly by repetition and partly by collateral support from the general literature of American politics, but studies in depth of the impact of regulated interests upon the regulatory agency and program have rarely been published. An understanding of the political aspects of regulation must build on further studies of the political settings of particular regulatory programs.

E. Methodology

Another urgent need in the research agenda of administrative regulation is the development and application of techniques of comparative analysis. Ways must be found to highlight and explain similarities and differences among regulatory programs and policies. We need to have better explanations of the curious phenomenon of the lack of adverse criticism of many regulatory programs despite their substantial reliance on conventional administrative modes of operation rather than formal procedures of rule-making and adjudication. We need to account for the fact that some regulatory programs, like the biologics standards program of the National Institutes of Health, have produced little or no litigation or cases for administrative adjudication and operate largely on the basis of discussion, negotiation, and joint consideration with regulated firms of problems and issues. We should be able to explain why two closely related bureaus in a single department that jointly administer a regulatory program, like the Bureau of Land Management and the Geological Survey in the Department of the Interior, have developed radically different patterns and traditions in exercising their regulatory functions. It would be very helpful to understand the role in current regulatory programs of nonadversary techniques and their significance compared to that of formal rule-making and adjudication. We need to discover the relationships between various regulatory patterns and such factors as the achievement of policy goals, fairness and equity in protecting the rights and privileges of individuals and firms, and relative capacity for imaginative formulation of policies. We need to know through examination of several programs whether regulation is likely to be more effective when some substantial element of competition is encouraged or maintained, or when the equities flowing to private parties from a government permit, license, or grant are not abnormally high. Comparative

[6] EARL LATHAM, THE POLITICS OF RAILROAD COORDINATION 277 (1959).

analysis of regulatory programs seems best calculated to throw some empirical light on the conditions that make for relative success and failure in administrative regulation.

III

TYPES OF EMPIRICAL WORK

The types of empirical work that might usefully be projected may be suggested by outlining some proposed hypotheses for further investigation. These hypotheses have been developed in a preliminary attempt at comparative analysis of seven federal regulatory programs.[7]

Hypothesis 1. The operations of regulatory programs in independent commissions are analogous to, and may be usefully compared with, regulatory activities of departments and other agencies.

Available studies and reports of the programs administered by the independent regulatory commissions suggests strongly that variations among commissions in terms of policies, political contexts of regulation, and sensitivity of political issues are probably more significant than their structural similarities. A comparison of the Securities and Exchange Commission and the Interstate Commerce Commission suggests that diversity among commissions runs very deep. The SEC's program on securities registration appears to have little relationship to other federal activities in the area of corporate and financial management. But the ICC's work in administering the agricultural-exemption provision of the Motor Carrier Act of 1935[8] directly invokes the in-

[7] This project on the regulatory process has been undertaken under the writer's direction, with the assistance of John Moore, Jack Brooks, and James Klonoski. The two-fold purpose of the study is (a) to discover the extent to which regulatory programs in operation involve processes and methods other than those relating to formal rule-making and formal adjudication; and (b) to formulate a conception of the regulatory process that embraces these operations. Seven regulatory programs in seven agencies are examined:

1. licensing of biologics (serums, vaccines, toxins, etc.), by the National Institutes of Health in the Department of Health, Education, and Welfare;
2. regulation incidental to the leasing of public lands for exploitation of oil and gas resources, in the Department of the Interior;
3. administration of the agricultural-exemption provision of the Motor Carrier Act, 49 Stat. 544 (1935), 49 U.S.C. § 303(b) (1958), by the Interstate Commerce Commission;
4. administration of the registration and disclosure provisions of the Securities Act of 1933, 48 Stat. 78, 15 U.S.C. § 77f (1958), by the Securities and Exchange Commission;
5. administration of the Perishable Agricultural Commodities Act, 46 Stat. 531 (1930), 7 U.S.C. §§ 499a-499r (1958), by the Department of Agriculture;
6. regulation of federal savings and loan associations, by the Federal Home Loan Bank System; and
7. regulation of nuclear reactors, by the Atomic Energy Commission.

The study includes departmental agencies, independent commissions, and a government corporation. It includes programs relating to financial affairs, classic public-utility-type regulation, regulation for the protecting of public health and safety, regulation incidental to the management of the public domain, and industry-oriented regulation. It includes programs in which technology is uncertain and subject to profound and rapid change. Some of the programs, on the other hand, exhibit little of novelty in technology. Some programs affect only a few regulated firms, whereas others affect thousands of firms and individuals. Some are administered under tight central control in Washington, while others are highly decentralized to an extensive field staff. Some are substantially judicialized, while others rely extensively on normal administrative methods and processes.

[8] 49 Stat. 544 (1935), 49 U.S.C. § 303(b) (1958).

terest of the Department of Agriculture. On the other hand, both programs involve a substantial ingredient of conventional administrative processes that often fall considerably short of formal rule-making and formal adjudication. Both programs operate in areas marked by certain changes in business techniques and technology, but the SEC processes several hundred cases annually, while the ICC deals with thousands. Politically speaking, the SEC program has been a highly stable one for at least a score of years, while the ICC program has embroiled the Commission in the politics of the farm bloc in Congress. At the same time, it may be useful to compare the biologics standards program of the National Institutes of Health with the SEC registration program. Both deal with relatively few firms. Both programs are set in motion at the beginning of an important business process—the sale of securities and the production of vaccines and toxins—not at some later stage of processing or distribution. In both instances, the protection of the public against abusive business practices is a powerful motive in the administration of regulations. One apparent consequence is a close identity of interest between the agency and its immediate regulatory clientele that has probably led to a clearer and sharper conception of the goal of public policy. Here it would seem to be most fruitful to make a detailed comparison of the NIH and SEC programs. The similarities are apt to be far more significant than differences in organizational structure.

Hypothesis 2. Much of the regulatory process works itself out not in terms of formal adversary-type proceedings, but rather in other types of administrative action.

In the comparative study of seven regulatory programs noted above, all involved some degree of use of nonadversary-type proceedings, although the variation from one program to another is striking. Even within agencies, differences can be noted in the practices of different bureaus or programs, and within a single program, important differences appear over time. In the case of the nuclear-reactor-licensing program in the Atomic Energy Commission, the unsettled state of reactor technology appears to be an influential factor in maximizing the need for close consultation between agency personnel and the reactor companies. When speed in reaching a decision is a paramount consideration, as it is in the administration of the Perishable Agricultural Commodities Act, there is resort to formal adversary proceedings only after attempts at administrative adjustment have clearly failed.

The use of techniques of surveillance and inspection also vary considerably and are generally highly symptomatic of the character of a regulatory program. The absence of a systematic program to review compliance with consent orders and decrees in the Antitrust Division and the Federal Trade Commission is primary evidence of the lack of interest in the agencies in appraising regulatory results and in keeping regulations and methods up-to-date. The less formal and more decentralized administrative pattern of the Geological Survey in handling its share of the minerals-leasing program contrasts sharply with the more formal, centralized, legalistic program of the Bureau of Land Management in the same area. The experience of the Federal Home Loan Bank System suggests that when the agency exercises

a strategic control over its regulated clientele, such as power to take control of a business from private managers, pressures are created that compel utilization of a variety of administrative methods. This experience suggests that if the Federal Communications Commission actually used its license-renewal procedure as a device for enforcing broadcast standards, it would have to rely much more heavily upon such methods.

Hypothesis 3. Technical aspects of regulatory programs are among the most significant factors that must be embraced in any meaningful concept of the regulatory process.

The style, tone, and pace of a regulatory program seem to be affected strongly by technical considerations. Perhaps the most dramatic case is that of the Atomic Energy Commission's licensing programs. So long as reactor technology remains highly unstable and the requirements of safety uncertain, it will be difficult to keep promotional and regulatory objectives apart in actual operations in the AEC. Similarly, until profitable operation of nuclear reactors becomes feasible, AEC regulators cannot ignore financial considerations in their licensing work. These technical aspects of atomic regulation for safety purposes are major factors in the total setting of the regulatory program.

Similarly, several technical aspects of the marketing of fresh fruits and vegetables must be mastered in order to understand the basic character of regulation of these perishable commodities by the Department of Agriculture. Such a factor as the rapidity of deterioration of particular fruits or vegetables under variable conditions of climate, refrigeration, ripeness, etc., becomes crucial in day-to-day decision-making in the program. Knowledge of marketing and distribution patterns is an essential prerequisite to effective adjustment of differences between shippers and receivers.

Hypothesis 4. Often regulation cannot be sharply separated from promotional programs.

As already indicated, it may be several years before the promotional and regulatory aspects of atomic energy programs can be substantially separated. Some programs, like the regulation of federal savings and loan associations, are administered by agencies with important promotional responsibilities. The Federal Home Loan Bank System both encourages the growth of federal savings and loan associations through a deposit insurance scheme and regulates them as a function of the insurance system. The National Institutes of Health are basically an organization devoted to the promotion of public health through scientific research, but the findings of its research scientists are basic to the exercise of its regulatory functions affecting vaccines and toxins. In fact, its regulatory staff is primarily a laboratory research staff who handle regulatory matters only as an aspect of their total job of scientific research. The registration of new issues of stock, as approved by the Securities and Exchange Commission, tends to promote public confidence in investment in corporate enterprises.

Hypothesis 5. The effectiveness of a regulatory program is influenced by the level of production and distribution at which it is principally aimed.

In the Department of Health, Education, and Welfare, two bureaus administer somewhat similar programs designed to protect the health and safety of the consuming public: the Food and Drug Administration, and the National Institutes of Health. In regulating the distribution of vaccines, drugs, and other medications, the National Institutes of Health tend to be more effective than the Food and Drug Administration, in part because basic controls are aimed at the primary level of production of vaccines and toxins rather than some subsequent level in the process of distribution. Such regulation involves a relatively small number of pharmaceutical houses with whom the National Institutes are in close touch. The Food and Drug Administration aims its controls, under statutory direction, to the distribution, not the production, of products subject to its regulations. It is dealing, consequently, with thousands of firms and individuals of great variety, including some that are not readily identifiable or visible to the regulators and some that are unaccustomed to regulation. In the Food and Drug Administration, the task of compliance and enforcement is far more difficult. In the NIH, controls are more certain of application; they are more directly applied; they are more likely to be understood and complied with.

Hypothesis 6. Regulation is likely to be more effective when several of the following conditions are present:

a. coercion is minimized;
b. some incentives are provided to encourage compliance and to win consent;
c. the policy context of regulation is broad and flexible;
d. political leadership in behalf of regulation has been mobilized;
e. some element of competition in the regulated industry or trade is encouraged or maintained;
f. the equities accruing to private parties through a license, permit, or grant are not excessively high; and
g. the goals of regulation, as set forth in statutes, have acquired an accepted meaning and do not remain substantially unresolved or inchoate.

The testing of this comprehensive hypothesis through empirical work is designed to clarify the conditions under which a regulatory program is most likely to flourish and, conversely, the conditions that make for frustration and failure.

Hypothesis 7. Continuing judicialization of administrative regulation under the Administrative Procedure Act has encouraged the growth of nonadversary methods to dispose of regulatory business and may have stimulated wider recourse to ex parte contacts and communications.

This hypothesis illustrates the importance of pursuing empirical studies in areas of conventional interest to lawyers. For even in these areas, there has been a dearth of empirical observation and reporting. Despite the outpouring of legal materials, the roles of hearing examiners, appellate judges, and agency heads have not been

examined adequately. The prospects of making case-by-case decisions more productive of policy have not been explored in the literature. The use of regulatory agencies as training-ground for the private practice of law has not been studied.

CONCLUSION

The conception of the regulatory process that has dominated the literature has been founded on categories of analysis that have not been supported by empirical evidence. More empirical work is urgently needed to formulate new categories of analysis, establish appropriate levels of generalization, probe issues of public policy, and develop adequate methodologies for the analysis of regulatory processes. The hypotheses suggested for testing indicate roughly the types of empirical work that political scientists, lawyers, and economists must engage in in order to develop a meaningful operating concept of the regulatory process and focus attention on substantive issues of policy.

The Law School of Duke University

The Law School of Duke University is a member of the Association of American Law Schools and is on the list of "Approved Law Schools" of the American Bar Association. The course of study provided covers the wide and varied range of subjects found in other national law schools. The training given is designed to prepare lawyers for practice in every state, and in the carefully selected student body there are now students from a majority of the states, from several foreign countries, and from over 50 institutions.

Emphasis is placed on individualization in instruction which is made possible by the size of the faculty, listed elsewhere in this issue. The proportion of full-time faculty members to students is exceptionally high. In addition to *Law and Contemporary Problems,* the Law School publishes the *Duke Law Journal,* which affords an opportunity for student training in law review writing.

The Law School occupies a building in the heart of the main campus of Duke University. It has a well-rounded library with a collection of over 100,000 volumes. Ample living accommodations for law students are provided in the Graduate Dormitory Center.

Although a college degree is ordinarily required for admission, students of exceptional promise who have superior Law School Admission Test scores and superior records in three years of undergraduate study at colleges and universities of approved standing are eligible for admission to the Law School. Information as to courses of study, probable expenses, and availability of financial aid will be sent upon inquiry to

THE DEAN, DUKE UNIVERSITY LAW SCHOOL
BOX C, DUKE STATION
DURHAM, NORTH CAROLINA

DUKE UNIVERSITY
SCHOOL OF LAW

FACULTY 1960-61

DERYL HART, A.B., A.M., M.D., PRESIDENT OF THE UNIVERSITY.

ELVIN R. LATTY, DEAN OF THE SCHOOL OF LAW. B.S. 1923, Bowdoin College; J.D. 1930, University of Michigan; J.Sc.D. 1936, Columbia University; Duke University since 1937.

HANS W. BAADE, ASSOCIATE PROFESSOR OF LAW. A.B. 1949, Syracuse University; Dr. iur. 1951, University of Kiel, Germany; LL.B., LL.M. 1955, Duke University; Diplomé 1956, Hague Academy of International Law; Privatdozent 1960, University of Kiel, Germany; Duke University since 1960.

W. BRYAN BOLICH, PROFESSOR OF LAW. A.B. 1917, Duke University; B.A. 1923, B.C.L. 1924, M.A. 1928, Oxford University; Duke University since 1927.

JOHN S. BRADWAY, PROFESSOR OF LAW EMERITUS. A.B. 1911, A.M. 1915, LL.D. 1957, Haverford College; LL.B. 1914, University of Pennsylvania; President, Association of Legal Aid Organizations, 1940-42; Duke University since 1931.

EDWIN C. BRYSON, PROFESSOR OF LAW. LL.B. 1937, University of Oregon; General Counsel, Duke University, since 1945; Duke University since 1931.

BRAINERD CURRIE, WILLIAM R. PERKINS PROFESSOR OF LAW. A.B. 1937, LL.B. 1935, Mercer University; LL.M. 1941, J.S.D. 1955, Columbia University; Duke University 1946-49 and since 1961.

ROBINSON O. EVERETT, VISITING ASSOCIATE PROFESSOR OF LAW. A.B. 1947, LL.B. 1950, Harvard University; LL.M. 1959, Duke University; Duke University since 1956.

PAUL HARDIN, III, ASSOCIATE PROFESSOR OF LAW. A.B. 1952, LL.B. 1954, Duke University; Duke University since 1958.

ARTHUR LARSON, PROFESSOR OF LAW AND DIRECTOR OF WORLD RULE OF LAW CENTER. A.B. 1951, LL.D. 1954, Augustana College; LL.D. 1956, Thiel College; B.A. 1935, M.A. 1938, B.C.L. 1957, D.C.L. 1957, Oxford University; Fellow of Pembroke College, Oxford University; Duke University since 1958.

CHARLES H. LIVENGOOD, JR., PROFESSOR OF LAW. A.B. 1931, Duke University; LL.B. 1934, Harvard University; Duke University since 1946.

CHARLES L. B. LOWNDES, JAMES B. DUKE PROFESSOR OF LAW. A.B. 1923, Georgetown University; LL.B. 1926, S.J.D. 1931, Harvard University; Duke University since 1934.

DOUGLAS B. MAGGS, PROFESSOR OF LAW. A.B. 1922, J.D. 1924, University of California; S.J.D. 1926, Harvard University; Duke University since 1930.

WALLACE MCCLURE, VISITING PROFESSOR OF LAW AND CONSULTING DIRECTOR OF WORLD RULE OF LAW CENTER. A.B. 1910, LL.B. 1911, University of Tennessee; A.M. 1915, Ph.D. 1924, Columbia University.

MALCOLM MCDERMOTT, PROFESSOR OF LAW EMERITUS. A.B. 1910, Princeton University; LL.B. 1913, Harvard University; Duke University since 1930.

FOREST HODGE O'NEAL, PROFESSOR OF LAW. A.B. 1938, LL.B. 1940, Louisiana State University; J.S.D. 1949, Yale University; S.J.D. 1954, Harvard University; Duke University since 1959.

J. FRANCIS PASCHAL, PROFESSOR OF LAW. B.A. 1935, LL.B. 1938, Wake Forest College; M.A. 1942, Ph.D. 1948, Princeton University; Duke University since 1954.

MELVIN G. SHIMM, PROFESSOR OF LAW. A.B. 1947, Columbia University; LL.B. 1950, Yale University; Duke University since 1953.

DALE F. STANSBURY, PROFESSOR OF LAW EMERITUS. B.S. 1914, Valparaiso University; LL.B. 1917, Indiana University; J.D.S. 1929, Yale University; Duke University since 1946.

LAWRENCE G. WALLACE, ASSISTANT PROFESSOR OF LAW. A.B. 1952, M.P.A. 1954, Syracuse University; LL.B. 1959, Columbia University; Duke University since 1961.

ROBERT R. WILSON, PROFESSOR OF POLITICAL SCIENCE AND INTERNATIONAL LAW. A.B. 1918, LL.D. 1940, Austin College; A.M. 1922, Princeton University; Ph.D. 1927, Harvard University; Duke University since 1925.